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NEW JERSEY EQUITY REPORTS.

VOLUME XXII.

C. E. GREEN, VII.

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NEW JERSEY EQUITY REPORTS.

VOLUME XXII.

C. E. GREEN, VII.

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REPORTS OF CASES

ARGUED AND DETERMINED IN

57

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

CHARLES EWING GREEN, Reporter.

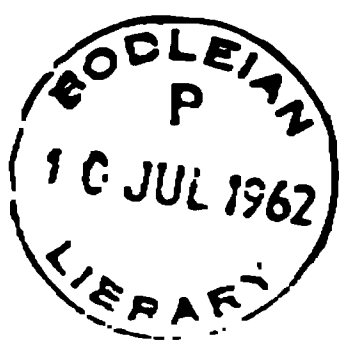
VOL. VII.

TRENTON:

MURPHY & BECHTEL, PRINTERS.

1872.

2085



CHANCELLOR
DURING THE PERIOD OF THESE REPORTS,
Hon. ABRAHAM O. ZABRISKIE.

VICE-CHANCELLOR,
Hon. AMZI DODD.

CLERK IN CHANCERY,
HENRY S. LITTLE, Esq.

Judges of the Court of Errors and Appeals.

EX OFFICIO JUDGES.

HON. ABRAHAM O. ZABRISKIE, CHANCELLOR.

“ MERCER BEASLEY, CHIEF JUSTICE.

“ JOSEPH D. BEDLE,

“ VANCLEVE DALRIMPLE,

“ GEORGE S. WOODHULL.

“ DAVID A. DEPUE,

“ BENNETT VAN SYCKEL,

“ EDWARD W. SCUDDER,

Associate Justices
Supreme Court.

Judges Specially Appointed.

HON. ROBERT S. KENNEDY,

“ EDMUND L. B. WALES,

“ JOHN CLEMENT,

“ JAMES L. OGDEN,

“ CHARLES S. OLDEN,

“ FRANCIS J. LATIROP, (vice VAIL,
term expired,) from March 9th, 1871.

This volume contains the opinions delivered in the Court of Chancery, at May and October Terms, 1871, and the only opinion delivered in the Prerogative Court, during the same period; and also, the opinions delivered in equity cases, in the Court of Appeals, from and including March Term, 1871, to and including part of March Term, 1872.

By an act of the Legislature, approved April 6th, 1871, the office of Vice-Chancellor was created; the power of appointment to reside in the Chancellor. In pursuance of that power the Chancellor appointed Amzi Dodd, Esq., of Newark, to the office. His commission bears date May 2d, 1871.

The first opinions of the Vice-Chancellor were delivered at October Term, 1871, and are reported in this volume.

The rules adopted by the Chancellor, by virtue of the above mentioned act, relating to proceedings before the Vice-Chancellor, numbered 169 to 184, inclusive, of the rules of the Court of Chancery, will be found at the close of this volume.

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ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

MAY TERM, 1871.

ABRAHAM O. ZABRISKIE, ESQ., CHANCELLOR.

AMZI DODD, ESQ., VICE-CHANCELLOR.

BOCKOVER *vs.* AYRES.

1. A sale and conveyance by an executor under an order of the Orphans Court for the payment of testator's debts, obtained after the lapse of a year from testator's death, vests in the purchaser only such estate as the heir or devisee was seized of at the time of making the order for sale.

2. A judgment against such devisee is unaffected by such sale and conveyance; it remains a lien on the land.

3. The judgment creditor, in such case, has no right to any part or share of the surplus of the purchase money in the executor's hands after the payment of debts.

In February, 1850, Jason Bockover, the complainant, recovered a judgment in Sussex County Circuit Court, against John Ayres, for \$2106, which is still unsatisfied, and on which several executions have been issued and returned. Enoch Ayres, the elder, the father of John Ayres and of the defendant, Enoch Ayres, died about the 1st of August, 1854, seized of considerable real estate in Sussex county. He left

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a will, dated September 23d, 1849, duly executed to pass real estate, and of which the defendant was executor. This will was proved and recorded, and letters testamentary issued to the defendant. The testator devised all his estate, real and personal, to his wife for her life, and gave and bequeathed unto his ten children, naming them, after the death of his wife, all his real and personal estate, share and share alike, and directed "that in case any of the above named shall die without leaving children, then their share to be equally divided, share and share alike, amongst the survivors of them, my children."

On the 5th day of August, 1854, John Ayres, one of the ten children named in the will, conveyed all his interest in the real estate of his father to the defendant in fee.

In December, 1855, the defendant, as executor, applied to the Orphans Court for an order to sell lands for the payment of debts, and the order was made December 8th, 1856, more than two years after the testator's death. All the real estate of the testator was sold under that order. By the final account of the defendant as executor, settled at September Term of the Orphans Court in 1858, the balance in the hands of the defendant, as executor, was settled at \$3506, which was invested by him on bond and mortgage, and the interest paid to the widow during her life. She died August 8th, 1870. One of the ten children of the testator had died without children in her life, but after testator.

The complainant, after her death, demanded of the defendant the proper share of this money which would be coming to John, or the owner of the share of testator's lands devised to John, the judgment debt of the complainant far exceeding such share of the surplus. He claimed it on the ground that, immediately upon the testator's death and before the conveyance to the defendant, his judgment became a lien upon the lands of John, and thus was entitled to be first paid out of the surplus.

The cause was argued upon final hearing upon the pleadings and proofs.

Bockover v. Ayres.

Mr. Anderson, for complainant.

Mr. J. C. Potts, for defendant.

THE CHANCELLOR.

A judgment is a lien upon all lands of which the defendant was seized or entitled to, or any estate in lands to which he was entitled at the time of the entry of the judgment, or at any time after. A remainder or reversion, if vested, can be levied upon and sold for the payment of such judgment. In this case, the right or estate of John vested in him at the death of the testator. Whether this estate was liable to be divested in case of the death of John without children, and whether such death mentioned in the will is to be referred to death before the testator or in the life of the widow, or to dying without children at any time, it will not be necessary to determine now, in the view I take of this case.

The effect of the sale by the executor for payment of debts, is fixed and settled by statute. That directs (*Nix. Dig.* 856, § 17,) that a conveyance by executors or administrators, by order of the Orphans Court for the payment of debts, "shall vest in the purchaser or purchasers all the estate that the testator or intestate was seized of at the time of his or her death, if the order be obtained in one year thereafter; and if the said order be not obtained within that time, then the said conveyance shall vest in the purchaser or purchasers all the estate that the heirs or devisees of the intestate or testator was seized of at the time of the making of the order of the Orphans Court." By this statute all the estate of the testator passes to the purchaser if the order is made in one year. The title is free from all conveyances or encumbrances by his heirs or devisees.

But when the order, as in this case, is made more than a year after his death, all conveyances made or encumbrances created by the devisee or heir, will be unaffected by the sale. The Supreme Court, in *Warrick v. Hunt*, 6 *Halst.* 1, and Chancellor Isaac Williamson, in *Parret v. Van Winkle*,

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cited in that case, page 9, declare such to be the effect of the statute. The same view is taken by Master J. W. Scott, in his opinion in *Skillman v. Van Pelt*, Saxt. 511. The judgment of Bockover being a lien on the lands, was not affected by the sale, and still remains a lien, if not satisfied or outlawed. His right remained in the land, and the price bid and paid by the purchaser was the value of the land, subject to the lien of this judgment. It follows that Bockover can have no right to any part or share of the purchase money in the defendant's hands, as no part of his property was sold to realize it. If John Ayres had sold his share to a stranger, that stranger would have retained his interest, notwithstanding the sale to pay debts, and upon the death of the widow could have called for a partition.

The complainant having, according to this view, no interest in the surplus, it is not necessary to determine whether the interest of John was for life or in fee, or determinable upon dying without children; or whether the conveyance to the defendant, one of the devisees, would have protected the estate from this sale as it would have been protected if conveyed to a stranger; or whether any suit in equity could be maintained for this surplus in the hands of the executor until the Orphans Court should have ordered a distribution of it as directed by the twelfth section of the act, in analogy to the ruling of the Supreme Court in *The Ordinary v. Smith's Executors*, 3 Green 92.

The bill must be dismissed.

UNDERHILL vs. ATWATER and others.

1. A mortgage that has been satisfied and delivered up to the mortgagor without being canceled, may be again delivered as a valid security by the mortgagor, and such new delivery gives it new vitality against the mortgagor, but not as against intervening encumbrancers.

2. The mortgage of a married woman given as collateral security for the debts contracted by the brother of her husband in continuing and preserv-

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ing the former business of her husband for his benefit, is satisfied and discharged by the release of the brother from such debts. It cannot be pledged by her husband for another purpose without her authority.

3. But when the brother was discharged from his debts on condition that the assets of the business should be assigned by him in payment of them, and that the creditor should retain the mortgage as security for the payment of the debts so assigned, such retention of the mortgage is for the purpose for which it was given, collateral security for the debts of the husband's brother; and the husband would have power to continue the mortgage for that purpose without further consent of his wife, were it not that by this arrangement she could no longer call upon the brother, for whom alone she was surety.

4. Although no express power is given to use or pledge a mortgage for a particular purpose, such power may be inferred from the circumstances of the case, the situation of the parties, and the general object for which the mortgage was given.

5. A complainant to whom a mortgage has been assigned as security for a specific debt, can only have a decree for that debt, although pending the foreclosure suit the whole mortgage is absolutely assigned to him. His remedy for the residue must be by supplemental bill or petition for surplus.

This suit was for the foreclosure of a mortgage given by the defendants, William Atwater and Margaret his wife, upon the premises of Margaret, to Gaston Lemercier, for \$8000; this was assigned by Lemercier to the complainant. The defendants claim that this mortgage was given without consideration to them, but to accommodate James B. Atwater, as collateral security for a loan made by Lemercier to him, and that this loan was paid and satisfied by J. B. Atwater to Lemercier before he assigned the mortgage to the complainant.

Mr. F. B. Ogden, for complainant.

Mr. E. M. Shreve and *Mr. B. F. Watson*, (of New York) for defendants.

THE CHANCELLOR.

The defendant, William Atwater, was engaged in mercantile business in New York, and in November, 1866, being embarrassed, assigned all his business and effects to Gaston

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Lemercier, for the benefit of his creditors. In February, 1867, Lemercier sold and transferred the whole of the property, with the store and business, to James B. Atwater, the brother of William; James paid the full consideration of the sale and became the legal owner of the property. He continued to hold it, and continued the business in the store until March 5th, 1868, when he sold the stock, business, and assets to Lemercier. Although James was the lawful and actual owner of the store and business, without any express or resulting trust, or any other trust for William, and had at any time the power to dispose of the whole at his own pleasure and for his own benefit, yet there was evidently an understanding that he was continuing the business with the intention of passing it over to William if he should become free from his debts. James, while he was the real owner and acted as such, allowed William to direct and control the business, and received out of the proceeds a salary of \$1500 as salesman, and performed the duties of a salesman. And on the 19th of February, 1867, James gave to Lemercier a written declaration that he agreed to carry on the business for the use of William, who had been unfortunate, and by which he agreed to transfer the business to William whenever he might require it.

James, whilst he carried on the business, needed money, which he borrowed at different times from Lemercier, and which, in the whole, exceeded \$11,000. In July, 1867, Margaret Atwater, with her husband William, executed to Lemercier a mortgage upon her residence in Bergen county, a farm of about forty acres, conditioned for the payment of \$8000, which was given as security for the money advanced by Lemercier to carry on the business. Lemercier, who was in Europe at the execution of this mortgage, upon his return was dissatisfied with it, because it had not in it the usual interest clause; on that account it was given up; and on the 11th of January, 1868, the mortgage set out in the bill was given by Mrs. Atwater and her husband, conditioned for the same sum as the first mortgage, and including the

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same premises. This was delivered to Lemercier for the same object, that is, as collateral security for the loans of money made to James by Lemercier, for the purpose of this business.

In March, 1868, the business of this store not having been prosperous was again embarrassed. The liabilities exceeded the assets by several thousand dollars, and the advances by Lemercier exceeded the mortgage to him by more than \$3000, and James was not disposed or not able to advance any more money for the object. In this situation William, acting for James, but without his knowledge or authority, began a negotiation with Lemercier to sell out the concern to him. A bargain seems to have been agreed upon by them on the 4th of March, 1868, that Lemercier should take the whole stock of goods at the valuation of \$8000, and take the other assets of the firm, and out of them pay the debts, as far as they would extend. James, when this agreement was communicated to him, refused to agree to it, and said that he would not transfer the property and business at all, unless he should be entirely freed from all debts and liabilities on account of it. A new agreement was thereupon made between him and Lemercier, which was reduced to writing, and executed by them under their hands and seals, and is dated March 5th, 1868. By this James assigned and transferred to Lemercier all the property and assets of that business, including the notes and book accounts, and Lemercier agreed to pay all the debts which James owed on account of that business. So far there is no dispute about facts.

Lemercier says that he refused, in his negotiation with William, to assume the debts, unless it should be agreed that he might retain the mortgage as collateral security for the payment of the debts due to James, which were to be transferred to him, and that William agreed that he might retain the mortgage for that purpose, provided the valuation of the merchandise was increased by about the sum of \$3000. That James took no part in this arrangement

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about the mortgage, and did not, so far as he was aware, know of it. Lemercier says, under this understanding he signed the agreement with James, and that without it he would not have signed it.

William denies all this, and says that there was no agreement or understanding whatever about retaining this mortgage, before the agreement between James and Lemercier was signed and fully executed. He says that after the sale on the same day, Lemercier remarked to him, "suppose these accounts are not all paid," and that he told Lemercier to hold the mortgage as security; and that this is the only authority he gave to hold the mortgage.

The question, whether the agreement that Lemercier might retain the mortgage as collateral security was made during the negotiations for the transfer and was part of that arrangement, or whether it was only a volunteered suggestion by William after the sale was completed, and without consideration moving to him or his wife, may be an important one. It is a mere question of the credibility of evidence. On the one hand, Lemercier, Henry C. Johnson, and Lindsley Underhill, who were present at the negotiation, say positively that this was part of the bargain for the transfer agreed upon by William Atwater and Lemercier before the execution of the agreement between James and Lemercier. They are contradicted by William Atwater and by him only; no other witness has any knowledge of the fact. Johnson, at least, is entirely disinterested, and beyond any known influence or bias. And his manner of giving in his testimony inclines me to give him credit. There is nothing, so far as I can discover in the attending circumstances, to throw doubt upon or discredit the story of these three witnesses; on the contrary, it seems to me to be the most probable version of the transaction. I feel compelled to believe the statement of these three witnesses, and to assume as a fact for the decision of the case, that William agreed with Lemercier, pending the negotiations for the transfer, that this mortgage should remain as security for the pay-

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ment of the accounts and notes assigned, and that this agreement was a consideration which induced Lemercier to enter into the agreement.

There can be no doubt but that a mortgagor may again use or negotiate a mortgage which has been satisfied and paid off and delivered to him, except as against intervening securities. The delivery of any instrument by the grantor gives it efficacy, and if he take a paper, executed and once used for another purpose, its re-delivery gives it again vitality. But such re-delivery must be by the mortgagor or grantor, and as in this case the real mortgagor is Mrs. Atwater, the owner of the mortgaged premises, the re-delivery or re-pledging must have been by her or some one authorized by her. Neither her husband nor any one else could take this or any other security which was paid or extinguished, and without her authority put it in circulation and thus give it vitality.

This matter involves two questions—first, whether this mortgage was paid or discharged, and, secondly, if it was, whether her husband had authority, express or implied, to authorize Lemercier to retain it, or to re-pledge it.

The mortgage was never canceled or delivered up. There was no agreement that it should be considered paid or surrendered. On the contrary, the agreement was that it should be retained as an existing security, and that substantially for the debt for which it was originally given. It was given to secure the money loaned by Lemercier—that money was not paid—it is not yet paid. He agreed to take the assets of James, including the accounts and notes, in payment of all the debts due to him from James, provided this mortgage remained as security for those accounts and notes. That is, if enough was not realised from those accounts and notes actually to pay the debt, the mortgage should still be liable; James only was to be discharged. The mortgage was not taken up, nor was it re-pledged. Nor was it pledged for a different debt, but it remained pledged for the same debt on other terms and conditions. But these altered con-

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ditions essentially changed the substance of the contract on which it was pledged. When pledged for the debt of James he was the principal, and the mortgage the security; and Mrs. Atwater, if she had to pay, could look to James, the brother of her husband, for re-payment. As it was when changed, she could look for re-payment only to a great number of small debtors to the concern, probably for the most part unknown to her, and also irresponsible. The party for whom she was security was entirely different. This change in the object for which the mortgage was given, was material, and could not be made by her husband without her authority.

Mrs. Atwater and her husband both testify that she never authorized him to re-pledge this mortgage in any way; their evidence is uncontradicted and must be believed. I have no doubt that no express authority was given by her to pledge this mortgage for any new object. The only authority given to him was that originally given when she executed the mortgage, and handed it to him to pledge to Lemercier for moneys advanced and to be advanced by him to James in this business. To ascertain that authority we must look both to the testimony and to the circumstances under which the mortgage was made and given. Mrs. Atwater had received from her husband a valuable property in her own name; he failed, and had no property and no business; his brother James fairly bought his store and business; the title was in James, but he, out of kindness to his brother, was willing to assume it and all the risks and liabilities, for the purpose of preserving it for William, and if successful, transferring it to him when he should be in a condition to assume it in his own name. Money became necessary, and this mortgage was given to procure the necessary money. Mrs. Atwater executed it and entrusted it to her husband to negotiate for that purpose. He testifies that in making and originally negotiating that mortgage, he was the agent of his wife. This was evidently so, and is no where denied. And it does not appear in the evidence that this general

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agency for negotiating that mortgage was limited to any particular terms; or that if he had negotiated it to Lemercier as the sole security for moneys advanced to that business without any personal liability of James, it would have been against his instructions, or in excess of his authority. The only question in this part of the case seems to be, whether William had authority to agree that this mortgage should continue after James was personally discharged. It was equitable when James, at the request of William, transferred a business into which he had entered for his benefit, that he should ask to be freed from the debts of the concern, so as to go out free from embarrassment. There was no injustice in having the mortgage of Mrs. Atwater, which was already liable for these debts, and could not be extricated otherwise as the concern was insolvent, still liable for any deficiency of the assets to pay these debts. Lemercier, in assuming the debts of the concern, then insolvent, was, in equity, entitled to retain this mortgage as security for the debts for which it was originally given. And William, who was the agent of his wife in negotiating that mortgage and arranging for its payment, made an arrangement within his power when he permitted it to be continued as security for the debt to Lemercier, providing that all the assets of the business should be first applied before the mortgage was called upon. Whether this was a more beneficial arrangement than to permit her to retain her recourse to James, does not appear.

The agreement with James cannot be affected; he had nothing to do with that concerning the retention of the mortgage; the agreement of Lemercier in effect discharged his debt, and by discharging the debt for which the mortgage was collateral would have discharged that, had it not been for the agreement that it should be retained. And it would not be equitable to permit Mrs. Atwater to claim that her mortgage is discharged by an agreement, or by the legal effect of an agreement, of which one of the stipulations was

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that it should be retained. If she claims the benefit of this agreement made by her agent, she should not be allowed to repudiate its conditions.

But irrespective of this equity, I am of opinion that the whole evidence, and the circumstances surrounding the transaction, show abundantly that Mrs. Atwater confided the whole matter of negotiating this mortgage to her husband, and that without any specific limitations; and that continuing it as collateral security for Lemercier's advances after James was discharged, was within the scope of that authority.

Of course the complainant only can hold the mortgage for the deficiencies in the payment of the notes and accounts assigned by James B. Atwater to Lemercier.

Lemercier at first assigned the mortgage to the complainant as security for \$4000, for which he had given his note. This was the only interest of the complainant at the time of filing the bill. Since then the mortgage has been assigned to him unconditionally, for a valid consideration. But in this suit the complainant can now have relief only upon his interest in the mortgage, as stated in the bill, and as it existed at the commencement of the suit. The decree can be only for the \$4000, to secure which the mortgage was assigned to him. If he desires to have a decree for the residue of the mortgage assigned to him pending the suit, it can be had upon a supplemental bill filed for that purpose. Or if the whole premises should be sold on a decree in this suit as it is, he might have adequate relief upon application for the surplus.

Duncan v. Hayes and Greenwood.

DUNCAN vs. HAYES and GREENWOOD.

1. Filling the air around a dwelling-house with dense smoke and soot or cinders, or with noxious or offensive vapors or odors, or with annoying noises, to such a degree as will render living in the house uncomfortable to persons of ordinary sensitiveness on those matters, is a nuisance and unlawful injury, which will be restrained by injunction.

2. If the title of the complainant is not disputed, and the injury is clear, it is not necessary that the fact of nuisance should be first established by a verdict at law.

3. It is well settled that a court of equity will not restrain, by injunction, any lawful business, or the erection of any building or works for such business, because it is supposed or alleged that such business will be a nuisance to a dwelling-house near it; it must be clear that the business will be a nuisance, and that it cannot be carried on so as not to be such.

4. Where the building or machinery is of itself no nuisance, the erection will generally not be stopped, but the defendant will be allowed to go on with it at the risk of not being permitted to use them in any way so as to cause a nuisance.

5. As to the business itself, if it is not clearly shown that it will be a nuisance in the way it is meant to be carried on, the court will not restrain it, but will compel the complainant to wait for his protection until it is in operation and it can be shown, without doubt, whether it is a nuisance or not.

6. No lawful occupation will be restrained or interfered with, unless it will actually interfere with the comfortable enjoyment of life, and it appears beyond any reasonable doubt that it will so interfere.

7. In a doubtful case, where the injury by prohibiting the business is great and certain, and the injury to the complainant, when it may occur, can be speedily remedied by an injunction applied for after the fact of nuisance is ascertained by experiment, the defendant, after being warned of the peril, will, in general, be allowed to proceed at his own risk, until the complainant is actually injured.

8. That the business proposed to be carried on by the defendant would injure the prestige of the complainant's house, make it less desirable for the better class of boarders who frequent it, and thus lessen her profits, is no ground for an injunction.

9. Increased risk from fire, and the consequent large rates of insurance, constitute no ground for injunction.

This case was argued on rule to show cause why an injunction should not issue.

Duncan v. Hayes and Greenwood.

Mr Pitney, in support of the rule.

Mr. Theodore Little, contra.

THE CHANCELLOR.

The defendants have begun to build on a lot lately bought by them at Morristown, a planing and saw mill, to be driven by steam. They intend to use as fuel for the steam engine, the chips and shavings of the pine boards to be worked there, which, it is alleged, produce soot and black smoke in large volumes. The complainant owns the adjoining lot, the house upon which is, and has been for years, occupied by her as a dwelling-house and boarding-house. It is kept as a boarding-house of the first class, and the complainant has a great many guests who regularly stay at her house. The chimney of the steam engine being put up by the defendants is about two hundred feet distant northerly from the part of her house nearest to it. The complainant alleges that the smoke from the chips and shavings to be used in the steam boiler, will fill and surround her house and make it uncomfortable for her or her guests to live in, and that the sawing and planing machines meant to be used, will make an intolerable noise and render the house uncomfortable; and that by these causes her house will become an undesirable residence for boarders, and her business be greatly injured, if not wholly destroyed.

The defendants in their answer, admit that they have begun to build such a mill in the location stated in the bill, and that they intend to use pine chips and shavings to drive the steam engine, and intend to operate sawing and planing machines in the building, but they deny that the house of the complainant will be rendered uncomfortable, or be seriously affected by either the smoke or the noise, or that her business will suffer by them.

There are a number of affidavits attached to the bill and to the answer, respectively, in support of the allegations in each. Many of them are to show the effect produced by a

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smaller establishment in Morristown for the same business, owned and operated by the defendants, which had recently burned down, and from which they had transferred their business to the present location.

The complainant alleges that the establishment will much increase the risk from fire, and raise the rate of insurance for her premises.

It must be taken as a settled principle, that filling the air around a dwelling-house with dense smoke and soot or cinders, or with noxious or offensive vapors or odors, or with annoying noises to such a degree as will render living in the house uncomfortable to persons of ordinary sensitiveness on those matters, is a nuisance and unlawful injury, which will be restrained by injunction. This subject has been considered and settled in this court, in the cases of *Davidson v. Isham*, 1 *Stockt.* 186; *Wolcott v. Melick*, 3 *Stockt.* 204; *Ross v. Butler*, 4 *C. E. Green* 294; and *Cleveland v. The Citizens Gas Light Co.*, 5 *C. E. Green* 201; and in *Crump v. Lambert*, 3 *Eq. Cases (L. R.)* 409; *Rhodes v. Dunbar*, 7 *Am. Law Reg., N. S.*, 412.

It is equally well settled that if the title of the complainant is not disputed, and the injury is clear, it is not necessary that the fact of nuisance should be first established by a verdict at law. *Shields v. Arndt*, 3 *Green's Ch.* 234; *Holsman v. Bleaching Co.*, 1 *McCarter* 343; *Ross v. Butler*, *supra*. The opinion of the Court of Appeals in *Carlisle v. Cooper*, 6 *C. E. Green* 580; *Crump v. Lambert*, *supra*; *Walter v. Selfe*, 4 *De Gex & Sm.* 315, and many other cases, hold this doctrine.

But it is equally well settled that a court of equity will not restrain, by injunction, any lawful business, or the erection of any building or works for such business, because it is supposed or alleged that such business will be a nuisance to a dwelling-house near it; it must be clear that the business will be a nuisance, and that it cannot be carried on so as not to be such. Where the building or machinery is of itself no nuisance, as in this case, the erection will generally

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not be stopped, but the defendants allowed to go on with it at the risk of not being permitted to use them in any way so as to cause a nuisance. As to the business itself, if it is not clearly shown that it will be a nuisance in the way it is meant to be carried on, the court will not restrain it, but will compel the complainant to wait for his protection until it is in operation, and it can be shown without doubt whether it is a nuisance or not. No lawful occupation will be restrained or interfered with, unless it will actually interfere with the comfortable enjoyment of life, and it appears beyond any reasonable doubt that it will so interfere. In a doubtful case, as the injury by prohibiting the business is great and certain, and the injury to the complainant, when it may occur, can be speedily remedied by an injunction applied for after the fact of nuisance is ascertained by experiment, it is better that the defendant, after being warned of the peril, should be allowed to proceed at his own risk, until the complainant is actually injured. If the business was restrained in the first instance, we could never learn from the great teacher experience, whether the business would, in fact, be a nuisance or not. This was the course pursued by Chancellor Williamson in *Wolcott v. Melick*, and by me in *Cleveland v. The Citizens Gas Light Company*. And the result in both cases proved its wisdom. The works in both cases are in successful operation, and no complaint has been made of either. In the last case, notwithstanding the proofs produced by the defendants, I had great doubts of the possibility of the success of the experiment, almost amounting to a conviction that it could not succeed, yet on account of the great injury to the defendants by prohibition, and the short duration of the injury, and the small damage to the complainants if it was not then enjoined, I permitted them to construct the work and put it in operation.

In *Ross v. Butler*, where the injury was of the same nature as charged here, the fact and extent of it was admitted by not being denied in the answer, except that it would be only for one day in every fortnight; and then the only

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question was, whether the defendant should be permitted to make the home of the complainant uncomfortable and insufferable, one day in fourteen.

Here the defendants deny that the complainant will be seriously incommoded by the smoke or noise, and support that denial by a number of affidavits. The proofs on their side, in my judgment, are fully equal in weight to those on part of the complainant. And it appears to me at least doubtful whether the smoke and cinders from a chimney fifty feet high, two hundred feet distant from any part of the complainant's house, will make her or her guests uncomfortable, or whether these or the noise will seriously annoy them. The chimney is north of the house, and I think the nuisance from the smoke will much depend upon the fact whether northerly winds prevail there, or whether, when they do occur, they are accompanied by falling weather, or such state of the atmosphere as would prevent a chimney fifty feet high from carrying smoke and cinders off above the complainant's house. Such result may be proven, but its occasional occurrence, once or twice a year, or perhaps oftener, would not be such a nuisance as would induce this court to interfere without a trial at law.

The title of the complainant to her premises, and to be protected from injury in the prosecution of a valuable and lawful business, is clear and is not disputed. If the injury was certain, or without reasonable doubt, I should not hesitate to grant the injunction.

That such an establishment beside her house, even if it did not by the smoke and noise render life uncomfortable, would injure the prestige of her house, make it less desirable for that better class of boarders who frequent it, and thus lessen her profits, is no good ground for restraining the defendants. A green-grocer's or butcher's shop, a licensed porter-house, or liquor saloon, always make any residence alongside of which they are placed undesirable, and would injure the business of a boarding-house; so would that most commendable institution, a public school-house. And many

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localities, which were the residence of the most refined and cultivated, have been deserted by them, because persons who pursue the occupation of the complainant have opened boarding-houses in them. Yet in these cases the damage results from lawful acts, and in equity as well as at law, there is no remedy for *damnum absque injuria*.

Increased risk from fire and the consequent large rates of insurance, are no ground for injunction. The reason sometimes assigned that the injury is only contingent, is not, perhaps, the correct one, because though fire may be contingent, the increase of the insurance rate is actual and certain. But if such was the rule, no house could be built on vacant lots in the vicinity of a house already there, within the distance which, by the rules of insurance companies, increases the risk and premium. No apothecary, cabinet maker, bookseller, stationer, or other business denominated hazardous or extra hazardous, could be permitted adjoining a dwelling-house, because this would increase the rates of insurance. I know of no precedent for an injunction against any business on account of increased risk from fire to the adjoining buildings.

If the defendants, knowing that they will not be permitted to render the dwelling of the complainant uncomfortable for her family or guests to live in, by smoke, cinders, or noise, choose to go on with the enterprise and risk the recovery of damages at law, or being restrained from using their works by the interposition of this court after all their expenditure, they must be permitted to do so.

The complainant has acted fairly in warning them by this suit, of her conviction that their works will inflict material injury upon her, and of her intention to restrain the use of these works if they do injure her. If they choose to proceed they must count the cost and risk, and rely upon their own judgment whether this business can be carried on there without injury to the complainant.

Injunction refused.

Blauvelt v. Smith.

BLAUVELT vs. SMITH and others.

1. The writ of assistance can only issue against persons who are parties to the suit, or who came into possession under a defendant after its commencement. But in all cases the parties in possession and against whom the writ is applied for, should have notice of the application, and are entitled to be heard on it.
2. This writ is a summary process, only used when the right is clear, and when there is no equity or appearance of equity in the defendant, and where the sale and proceedings under the decree are beyond suspicion.

On application for writ of assistance. The case was argued upon the petition of Frederick B. Hinds, one of the defendants, who also became the purchaser of the mortgaged premises at a foreclosure sale by the sheriff.

Mr. Ransom, for petitioner.

Mr. A. S. Jackson, for Mrs. Smith.

THE CHANCELLOR.

F. B. Hinds bought the premises ordered to be sold by the final decree in this cause, at the sheriff's sale, and has received the sheriff's deed for them. Sarah Ann Smith was one of the defendants. The application is for a writ of assistance, directing the sheriff to put the purchaser in possession of the mortgaged premises.

There are several other persons in possession of parts of the mortgaged premises, or rather of the tenement house upon them; some of these persons were tenants at the commencement of the suit, others were not, but have succeeded those who were then tenants. None of these tenants were made parties to the suit; one of them, Matilda Sturges, who claims to hold the legal title of the premises, was there before the commencement of the suit, and still remains. The writ of assistance can only issue against persons who are parties to the suit, or who came into possession under a defendant after its commencement. But in all cases the parties

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in possession and against whom the writ is applied for, should have notice of the application, and are entitled to be heard on it. In this case, no one in possession has been notified except Mrs. Smith, and the writ could not be issued as applied for, to put the purchaser in possession of the mortgaged premises. It might be issued to give possession of the part occupied by Mrs. Smith herself.

But this writ is a summary proceeding, by which this court puts a purchaser in possession without any trial of his right or any opportunity for the defendant to make defence. It is done on the principle that the rights of the defendant, including his right of possession, had been sold under a decree of this court in a suit to which he was a party, and in which he had a right to be heard. But this summary process is only used when the right is clear and when there is no equity, or appearance of equity, in the defendant, and where the sale and proceedings under the decree are beyond suspicion.

The property sold under this decree is worth some \$5000 or \$6000, and was sold for \$800, a price grossly inadequate. Mrs. Smith, who has the life estate, is an infirm paralytic, almost deprived of her intellect, with barely sufficient capacity to execute these mortgages, if sufficient for that. She and her two children, who live with her, and her mother of eighty years, who occupies the upper story, are miserably poor. The property had been conveyed by the husband of Mrs. Smith, in his lifetime, in trust for her, and they seemed to have doubted whether these mortgages were valid, and between ignorance, poverty, and incapacity, the sale was unattended to. It may yet be possible to institute some proceedings by which this sale, apparently so inequitable, may be set aside. Under these circumstances, I think I ought not to give the purchaser the extraordinary relief of the writ of assistance, but leave him to his action of ejectment. It is less important in this case, as only a small proportion of the house could be delivered to him by this writ, and he would be compelled to bring ejectment for the residue.

The application must be denied.

Stanford v. Lyon.

STANFORD vs. LYON and wife.

1. A devise of a building and lot to A, on condition that he will permit B "to carry on the business of a druggist on that part of the premises then occupied by him for his business of a druggist (being part of the first floor of said building), so long as he should desire to use it for that purpose," created no easements in the adjoining lot for the use of hydrant and for passage over said lot, in favor of B, though he had been allowed these privileges in the testator's lifetime.

2. The devise as to B, being only the privilege reserved of carrying on the druggists' business in the parts occupied by him at testator's death, is simply the right to occupy.

3. The owner of lands can have no easement in or over his adjoining lands, and when he sells one parcel, the right to enjoy privileges and conveniences which he, when owner of both, enjoyed in the other, does not pass to the purchaser.

This was a motion to dissolve an injunction upon bill and answer.

Mr. McCarter, in support of the motion.

Mr. Runyon, contra.

THE CHANCELLOR.

The injunction restrains the erection of a building on the rear of the defendant's lot. The complainant claims the right to pass over the part of the lot where the building was being erected, for access to the privy, hydrant, and back gate, from the store and office occupied by him on the first floor of the building. This right was claimed under a devise in the will of Luther G. Thomas, the former owner of the whole premises. By that devise he gave the premises to Lemuel Thomas, from whom the defendants derive their title, on condition that he should permit the complainant to carry on the business of a druggist on that part of the premises then occupied by him for his business of a druggist, so long as he should desire to use it for that purpose. The

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premises were on the southeast corner of Elm and Mulberry streets, in Newark; the part occupied by the complainant at the making of the will, and which he occupied as a partner of testator, was the store on the first floor at the corner, with the cellar below it, and an office east of it on Elm street, separated from it by the hall opening on Elm street, and the passage-way to and through this hall from the store to the office. The complainant, both in the lifetime of the testator and since his death, had been in the habit of using, in common with the occupants of the other parts of the house, a hydrant and privy in the yard, and to pass out of a gate opening on Elm street, and to pass through the part of the yard where the building was being erected for that purpose.

The defendants claim that this devise only gave to Stanford the right to occupy the store, cellar, office, and hall leading from the store to the office, and that the use of the privy, hydrant, and passage to them and through the back gate, did not pass by the devise, nor did it create easements for these.

The owner of lands can have no easements in or over his adjoining lands, and when he sells one parcel, the right to enjoy privileges and conveniences which he, when owner of both, enjoyed in the other, does not pass to the purchaser. The question in this case appears to me to be controlled by the decision of the Court of Appeals in *Fetters v. Humphreys*, 4 C. E. Green 471. The devise in that case was of a lot occupied by the testator. From the barn on the rear of this lot he had always passed over an adjoining lot belonging to him into the street; there was no other passage open; no other could be opened, except through an ornamental garden beside the dwelling-house, into the front street. It was held that the right to pass out over this other lot did not pass as part of the lot *occupied* by the testator; that the word "occupied" was apparently confined to corporeal hereditaments, and did not include the easements usually enjoyed with the land, unless they were legally easements on the

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land of another, and as such appurtenant to the premises. Neither of the rights claimed here would be a continuous or apparent easement, and they therefore do not pass, or are not created by a conveyance of part of the premises.

This view is clearer in this case, the only devise being the privilege reserved of carrying on the druggist's business in the parts then occupied by him. This creates a freehold estate, but it is not so broad as a devise of these parts for the term. It is simply the right to occupy. It is also confirmed by the agreement executed between the parties under their hands and seals, in which the parts occupied by the complainant are recited to be the store, the cellar under it, and the office; no mention is made of the privileges claimed in the yard. The complainant is not estopped by this recital, but it is evidence of what were the parts occupied by him at the making of the will.

And if the rights of the complainant are not settled by the decision in *Fetters v. Humphreys*, yet as they have not been settled at law or settled in his favor by any determination of a court of law in this state upon a like devise, an injunction should not be granted or continued until the right on which it depends has been settled at law. *The Morris and Essex R. Co. v. Prudden*, 5 C. E. Green 530.

The injunction must be dissolved.

THE METROPOLITAN BANK vs. DURANT and others.

1. Where a debtor has transferred his property to his wife, who holds it for his use, and permits him to control and enjoy it, and he thereby defies and defrauds his creditors, it will not protect him, in a court of equity, that the forms of law have been pursued.

2. No payment of consideration will protect any sale contrived and accomplished to defraud creditors, when the purchaser has knowledge of the sale.

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The complainant obtained judgment against the defendant, C. F. Durant, in the Supreme Court of this state, February 27th, 1866, for \$10,664.74. To the execution issued on this judgment the sheriff returned that the defendant had no goods or lands. A large amount of real estate which C. F. Durant had owned in 1862, had, by executions on certain judgments against him, been sold to the defendant, J. J. Durant, and by him conveyed to the defendant, E. H. Durant, the wife of C. F. Durant, and are now held by her. The complainant contends that these sales were a fraudulent contrivance between the three defendants to transfer this property to the wife for the purpose of protecting it from the creditors of C. F. Durant, and the bill seeks to set aside these conveyances as against the complainant, and prays that the lands may be sold to pay the debt due to the complainant.

The defendants have answered upon oath, as required. They deny fraud and fraudulent intent, but admit most of the facts alleged in the bill from which the court is asked to infer the fraud. The complainant has examined witnesses and produced documentary proofs: the defendants have produced no testimony.

Mr. Gilchrist, Attorney-General, for complainant.

Mr. B. Williamson, for J. J. Durant and E. H. Durant.

Mr. C. F. Durant, pro se.

THE CHANCELLOR.

The facts as admitted or clearly shown, are these: That in 1857, C. F. Durant owned the real estate in question consisting of twenty-eight lots in Jersey City. They were situate in three distinct and separate parcels, one consisting of twenty-one lots, one of four lots, and one of three lots. They were worth about \$100,000, were not encumbered, and he was nearly, if not wholly, free from debt. On or

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parcel of these lots were three brick dwelling-houses, in one of which he resided, and in which he continues to reside. He also had a printing office in New York, where he carried on the business of a printer.

In 1857, Arbuckle and Co., a New York firm, assigned their property to him for the benefit of their creditors. He collected out of their assets a large amount of money, more than \$60,000, a great part of which he appropriated to his own use. He borrowed two sums of \$8000 and \$6800, upon two separate mortgages on two of the three parcels of land, which included seven of the twenty-eight lots; with this and moneys received from the assets of Arbuckle and Co., he erected ten brick and two frame buildings on some of the twenty-eight lots; six of these were on the lots not included in the two mortgages. These mortgages were made in July, 1859, and April, 1860, and the buildings were erected about the same time. These buildings cost about the sum of \$30,000.

In March, 1859, the complainant, who was a creditor of Arbuckle and Co., commenced a suit against C. F. Durant, as assignee, in the Supreme Court of the state of New York, to enforce the payment of the debt due to it, and the referee in that suit, before whom the proceedings were continued for years, reported to the court in favor of the complainant, and judgment was entered in favor of complainant against C. F. Durant, on that report, in October, 1865, for \$10,-341.11; upon this the suit was brought and judgment rendered in the Supreme Court of this state. The referee also, by a report dated July 22d, 1863, reported that the defendant had been guilty of violations of the trust under the assignment, and had appropriated moneys collected by him to the payment of his own debts, and that there was in his hands moneys of the trust to the amount of \$48,684.29, with interest on it from May 1st, 1863, applicable to the payment of the creditors of Arbuckle and Co. Upon this report judgment was rendered in the Supreme Court of New York, September 30th, 1863, one part of which was, that the de-

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fendant, C. F. Durant, should pay that sum and the interest thereon to a receiver appointed in that suit.

In July, 1860, the referee in the suit in New York, determined, upon argument, that Durant was liable to account to the plaintiff in that suit. This was the first decision in it. Soon after this, in 1860 or 1861, C. F. Durant disposed of his printing establishment in the city of New York, and from that time went seldom to the city, and after the assignee's report, refrained from going to the city, with intent, as he declares in his answer, to compel the complainant to transfer the litigation to New Jersey.

On the 4th of June, 1861, Charles Palmer recovered a judgment against C. F. Durant in the Supreme Court of this state, for \$1800, in an action on the case; this suit was contested by Durant; he removed it to the Court of Errors, where the judgment was affirmed; after which an execution against goods and lands was issued on this judgment, tested April 8th, 1862. On the 11th of April, 1862, a judgment was entered in the Supreme Court by confession, against C. F. Durant, in favor of his brother, the defendant, J. J. Durant, for \$11,672, and a *fieri facias de bonis et terris* was issued upon that judgment the next day. On that day the sheriff of Hudson advertised that he had levied on the three parcels of land in question, and would sell them on the 12th of June, exactly two months from the teste of the execution of J. J. Durant. The advertisement was inserted in a paper published at Hoboken, and not in any paper in Jersey City, where the lands were situate, and was preceded by the universal declaration, "subject to prior encumbrances," "value one dollar." The property was, in fact, worth considerably over \$100,000, and the only encumbrances were the two mortgages for \$14,500.

The property was sold by the sheriff on the day advertised. C. F. Durant was not at the sale. J. J. Durant attended, and the whole property was struck off to him for \$10,000. The whole twenty-eight lots in the three parcels, were put up in one lot and struck off at one bid. There is no direct

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proof of this. But it is so charged in the bill and not denied in the answer, and may be well taken as confessed. And the recital in the sheriff's deed states one offer, one bid, and one striking down; and this recital, uncontradicted, is proof that the whole premises were struck off at one bid.

The sheriff's deed was dated on the 16th, and acknowledged on the 19th of June, 1862. On the 18th of June, 1862, J. J. Durant, in pursuance of an arrangement made before the sale, borrowed \$2300 of the executors of L. Gordon, on the security of a mortgage upon one of the twenty-one lots not included in the two prior mortgages, and out of this the Palmer judgment, and the costs and expenses of the confessed judgment, and in part of the Palmer litigation, were paid.

C. F. Durant continued in possession of the property after the sale, and from then until now, renting the houses, collecting the rents, and appropriating them to his own use, after paying the taxes. J. J. Durant, by deed dated July 13th, 1866, recited to be in consideration of \$60,000, conveyed the whole property in fee to E. H. Durant, the wife of C. F. Durant, subject to the three mortgages above mentioned.

No consideration was paid to J. J. Durant for this conveyance, but a mortgage without a bond was executed by E. H. Durant to him to secure \$60,000. This was given on a small fraction of this property, a triangle of sixty feet perpendicular, and thirty feet base, fronting on Newark avenue, which the city authorities were about to take to extend Montgomery street; it contained little more than one-third of a lot. The property by itself was not worth \$60,000, or one-fourth of it, but it was supposed, or at least alleged, that the city would have to pay off the mortgage to authorize them to take the property. The taking of this strip cut off the fronts of three new brick houses, and part of the front of a fourth, and left all four open in front and untenable.

After this the city authorities opened Montgomery street, and about \$20,000 was awarded for the land taken and

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damages; this amount was paid to J. J. Durant by a check which he handed over to C. F. Durant; none of the proceeds were ever paid to him, and he never received any consideration whatever for his conveyance to E. H. Durant, and has no security or obligation for it.

C. F. Durant has always since then, collected the rents and appropriated them, and kept no account of them. For several years, when these rents amounted to several thousand dollars, he has, in his return to the internal revenue collectors, stated that his wife had no income whatever. He employed the counsel in this suit for J. J. Durant and E. H. Durant, and has attended to the litigation in person. He has, pending this suit, erected a large and expensive building, known as the Kepler Market, upon part of the tract of twenty-one lots.

The consideration of the judgment confessed to J. J. Durant does not distinctly appear. The answer on this head is vague, evasive, and unsatisfactory. The story to be gathered from it is this: That in 1841 C. F. Durant owned some land somewhere on Bergen Hill. J. J. Durant, to relieve the *immediate necessities* of C. F. Durant, verbally agreed to purchase it for a price not stated, and which was to be paid by instalments in amounts and times not disclosed. No deed or written agreement of sale was executed. In January, 1853, C. F. Durant and wife conveyed this tract to *some one* not named, for \$7,250, which was secured by mortgage. This mortgage was to C. F. Durant, and the money was paid to him in 1856. He omitted to pay this money to J. J. Durant when received. For this amount, and the interest thereon in April, 1862, by the advice of E. H. Durant, it was arranged to confess a judgment to J. J. Durant, for the purpose of saving the whole property from being sacrificed by the Palmer judgment.

Here, then, is exhibited a debtor who, in 1857, owned real estate worth \$100,000, and unincumbered, and which, without regard to the improvements, is now worth nearly double that sum; and on which there is now no bona fide encum-

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brance, except the Gordon mortgage, that is not fully represented by buildings since erected on the property. This debtor in 1857 accepted an assignment of the effects of a large business firm in New York, out of which he has collected and appropriated to his own use over \$48,000, much of which was expended in improvements on this property.

This property, by the machinery of a sheriff's sale got up by this debtor, his wife and brother, upon an adverse judgment, transferred to friendly hands, and a judgment confessed for the purpose to his brother, has become vested in the wife of the debtor, who has never paid one dollar of consideration, and never had any means to pay, except her inchoate dower and the assumption of mortgages not one-tenth of the value of the property; and she holds it for his use and permits him to control and enjoy it, and put at defiance his creditors, including those whose money, in breach of his trust, he appropriated to erect the buildings upon it.

It would be a disgrace to our courts if they could not give a remedy against fraud and abuse of trust like this. That the forms of law have been pursued is no protection in a court of equity, if the result aimed at and reached is a fraud. The Paimer judgment was a legal claim against Durant, which he had to pay, and which had a preference over creditors at large. He could have been paid it at any time by money raised on the security of one-twentieth of this property, as the money actually used for its payment was eventually raised by the Gordon mortgage.

All pretence that this large property was in any danger of being sacrificed by that judgment is mere trifling, and when set up in an answer, under oath, is calculated to prejudice the parties who have ventured to swear to it. The reason for the confession of judgment to J. J. Durant, and the story of its consideration, are both suspicious. It is claimed to have been devised to save the sacrifice of the real estate. It is not pretended that it was to obtain for J. J. Durant the payment of his debt. He did not use it for that purpose. When the money got by means of the mortgage

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that was the alleged consideration of the sale, was put in his hands, nearly double his pretended debt, he handed the whole back to Charles, without putting a dollar to his credit, or in his pocket. The story of the consideration is most extraordinary, vague, and incredible, avoiding all particulars by which its truth could be tested, and savors so much of fiction and fraud, that it is difficult, if not impossible, to compel the mind to believe it.

But if this claim were ever so just and clearly established, this judgment has been so used, and this sale has been managed and conducted so clearly for the purpose of placing the property of C. F. Durant beyond the reach of his creditors, that it could not be sustained. No payment of consideration will protect any sale contrived and accomplished to defraud creditors, when the purchaser has knowledge of the object of the sale.

The defendant, E. H. Durant, is neither a purchaser for a consideration or without notice. She was party to the scheme. She advised the confession of the judgment to J. J. Durant. and she has not paid one dollar for the property. At the suit, the Palmer judgment was in the hands of a friend. The execution of J. J. Durant was put in the sheriff's hands, and the property advertised on the very day of its teste. Such extraordinary haste was not necessary to make a fair debt out of property of more than ten times the value required. The unusual prefix to the advertisements may possibly have been the work of the sheriff, but the evident tendency to aid the object in view, or supposed to be in view, and the absence of any other object, makes it probable it was a part of the fraudulent scheme. The fact that C. F. Durant did not attend a sale in which \$100,000 worth of property might be and was sold for \$10,500, a result which his presence would certainly have avoided, shows to my mind conclusively, that the sale was a fraud, and not for the purpose of making the debts. Any one house and lot would have brought the amount of the Palmer judgment; any two of them ought to have brought the amount of the judgment

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of J. J. Durant. There were thirteen lots, with brick houses on them, of this value. The defendant was entitled to have these lots sold separately, and the sheriff, upon his request, was bound so to sell them, and would have sold them separately. He must be taken to have known this. The sale in one parcel, of three tracts which did not adjoin each other, and each of which was of the value of both judgment debts, was an abuse which must have been apparent to the sheriff and all parties concerned; and it is but fair to the officer to presume that he would not have committed it, except by instruction. The defendant, unless he had consented, could have had the sale set aside if he had applied. And it is impossible to believe that after such a sacrifice, when it came to his knowledge, he would not have applied to set it aside if it was not a scheme concocted between him and the purchaser.

The indicia of fraud that surround this whole transaction, make the conclusion inevitable, that this sale was not for the purpose of making the money due on these judgments, but to vest the title of this property in the brother and wife of C. F. Durant, to enable him to put his creditors at defiance.

In this case the fraud is so apparent on the whole proceeding, and so little effort has been made to conceal the object in view, that it seems superfluous further to go over the details of the case to point out the evidences of the fraudulent intent. The complainant is entitled to the relief asked for in the bill.

Fowler v. Colt.

FOWLER and wife vs. COLT and others.

1. A testator directed \$40,000 to be held in trust for his grandson, to be paid to him when he arrived at the age of twenty-five years, with the increase thereon by accumulation. The testator died in 1856. The executors did not separate any sum of \$40,000 from the rest of the estate for the purpose of this trust. The great bulk of the estate remained invested in the stock of the Society for Useful Manufactures, of which it consisted at the testator's death. The par value of it was \$100 per share; its real value at the testator's death, \$250; and its present value \$300 per share. The society had mortgage debts at testator's death, many of which have since been paid off out of its assets, and have bought and sold real estate, but to what value does not appear. It declared irregular dividends on the shares since his death, not based upon the earnings of the society, but upon the necessities of the executors and testator's children. These have varied from four to seven per cent yearly, on the par value of the shares. The master was directed to allow interest at the rate of seven per cent. for the time in which the executors received the interest at that rate, and at the rate of six per cent. during the residue of the time. He has computed interest at seven per cent. during that part of the time in which the executors received dividends at that rate on the par value of these shares, and allowed interest upon interest. The exceptants contend that interest should be allowed at that rate only when the dividends amounted to seven per cent. on the real value of the shares in which the estate was invested, and that interest should not have been calculated upon interest. *Held*, that the master rightly allowed the seven per cent. on the par value during the time that that rate of interest was paid, and that the interest was properly computed by yearly rests.

2. The funeral expenses of the granddaughter of the testator, and the physician's bill in her last illness, cannot be ordered to be paid out of the testator's estate, there being no estate of her own out of which these expenses can be paid. She was under the age of eighteen years at her death in September, 1866. The income of \$20,000 directed to be held in trust for her had, by order of the court, been expended in her education and support, except \$789, which was the increase by accumulation. The testator directed, if she should die without issue under twenty-five, that the sum of \$20,000 given to her, with the accumulations thereon, be added to his general estate, and considered as part thereof. That estate he gave to three of his children, then living. The will also directed that the granddaughter should be educated and supported out of this income until she was eighteen. The medical expenses exceeded the surplus of \$789. *Held*, that the granddaughter being entitled to the whole of the income for her support, there could be no accumulation in the sense in which that word is used in the will, so long as the physician's bill, or any expenses incurred by or for her

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in her lifetime remain unpaid, and that the surplus must therefore be applied to the medical expenses. If the medical expenses did not absorb the surplus, the funeral expenses would also be included in this provision for her support and maintenance, and any balance would have been applied for that purpose. But the principal of \$20,000 was not subject to her support and maintenance, in case of her dying under twenty-five, but was vested in the legatees. These expenses cannot be ordered to be paid out of the estate of the testator.

3. A gift of a fund with its increase from accumulation, amounts to a direction to the executor to accumulate, which can only be done by putting it at interest. And where the fund is large, and the time for holding it in trust long, this direction must be held to apply to the interest as well as to the principal.

4. In all cases where the will contains no directions as to commissions or expenses of administration, specific legacies and bequests of specific sums are not charged with them, but are paid in full, and the commissions are taken from the residue, or such assets as are not disposed of.

5. If a father does not sufficiently provide for the support of a child or one to whom he stands *in loco parentis*, the courts cannot take from the legacies to others to furnish such support, or pay funeral expenses in case of death. When a legacy to a child of the testator is directed to be paid on a future day, with no direction as to interest, in the case of an infant having no other means of support, they will order interest to be paid.

6. Where a fund is given at a future day to several, with provision that if any die, their share should go the survivors, support for all will be ordered out of the fund; but this is only in cases where all are included in the contingency of advantage from the gift over, and of loss by dying before the time specified. And in such case when there is an absolute gift over on the death of all it will not be ordered, unless by consent of the person to whom it is so given.

On exceptions to master's report, made on petition of R. L. Colt, junior.

Mr. W. Pennington and Mr. Ashbel Green, for exceptants.

Mr. C. Parker, for R. L. Colt, junior.

THE CHANCELLOR.

By an order made by written consent of parties, it was referred to a master to report the interest due to the petitioner, on the sum of \$40,000, directed to be held in trust

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for him by the will of his grandfather, R. L. Colt, and to be paid to him when he arrived at the age of twenty-five years, with the increase thereon by accumulation. The testator died in 1856, but the executors never put aside any sum of \$40,000, or in any way separated it from the rest of the estate, to be held for this trust. The whole, or the great bulk of the estate, remained invested in the stock or shares of the Society for Useful Manufactures, of which it consisted at the testator's death. The par value of this stock was \$100 per share, its real value at the death of the testator was \$250, and its present value \$300 per share. The society had mortgage debts at the death of the testator, many of which have since been paid off out of its assets, and have bought and sold real estate, but to what values does not appear. It declared irregular, desultory dividends on the shares since the death of the testator, not according to or based upon the earnings of the society, but upon the necessities of the executors and the testator's children. These have varied from four to seven per cent. yearly, on the par value of the shares. The master was directed to allow interest at the rate of seven per cent. for the time in which the executors received interest at that rate, and at the rate of six per cent. during the residue of the time.

He has computed interest at the rate of seven per cent. during that part of the time in which the executors received dividends at that rate, on the par value of these shares. The exceptants contend that it should be allowed at that rate only when the dividends amounted to seven per cent. on the real value of the shares in which the estate was invested. The only question is upon the meaning of the order, or rather of the agreement between the parties, for that order is only an agreement put in the form of an order, and I cannot go back of it and look into the equity of the case, or real rights of the parties.

The "money belonging to the petitioner," to use the words of the order, was at that time in the shares of the company, and the dividends upon those shares was the only interest

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received. There was no money actually set aside for and belonging to him, and it might be argued that there was no interest received on it by the executor. This would clearly not accord with the intention of the parties to that agreement. They knew how this estate was invested, and that the only interest received was these dividends, which for part of the time were at seven per cent. on the par value, and at other times less. And this order must be construed to refer to these dividends on the par value, as the rate of interest referred to. I think the master has rightly construed this order, and that this exception must be overruled.

The next exception is to the mode of computing interest by yearly rests, so as to charge compound interest. As the will gives the fund set aside, with its increase from accumulation, it must be held to direct the executor to accumulate, which can only be done by putting it at interest. And where the fund is so large, and the time for holding it in trust is so long, as in this case, this direction must be held to apply to the interest as well as the principal. And without regard to this direction, a trustee would not be permitted to allow amounts of interest so large as those received in this case, to lie idle for years uninvested. The master was right in calculating interest by yearly rests.

M. G. Colt, the acting executor, excepts to the report on the ground that the master has not allowed commissions on the principal of this legacy. And the petitioner excepts, because the master has allowed commissions on the income paid the petitioner since he arrived at twenty-one.

As far as can be gathered from the report, and the account annexed, for they are not explicit or very clear on this point, the master has allowed commissions at the rate of two and a half per cent., as against R. L. Colt, junior, on the income paid to him, but has not charged it upon the principal of the legacy. R. L. Colt, junior, excepts because he is charged with this commission on the income. The executor excepts, because R. L. Colt, junior, is not charged with the commis-

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sion on the principal, and because it is left to be paid out of the estate.

It seems to me that both questions depend upon the construction of the last clause of the codicil. That directs that the executor "shall charge a commission of two and a half per cent. on the sums he shall pay out of the trust created for the support and education of my said three grandchildren." The testator directed in his will that \$10,000 should be paid out of his estate to his executor, for his services as acting executor and trustee of his will. In the will he gave to the three children of his deceased son, Roswell, of whom R. L. Colt, junior, is one, an equal fourth part of his whole estate, to be equally divided between them, and directed the income to be applied to their support and education, until of age, and then the income of the share of each to be paid to him during his natural life, and the principal on his death to his lawful issue; and directed that his acting executor should be allowed a commission of five per cent. on the yearly income of said share, until disposed of as directed. The provision in the will only allows a commission on the income; it is confined to that by the words. I think the words of the codicil confine the commission to the income, even without reference to the provision on the same subject in the will.

In the codicil the provision is, "that after my said grandson, R. L. Colt, junior, shall arrive at the age of twenty-one years, the whole yearly income of said \$40,000 shall be paid to him until he arrive at the age of twenty-five years, *if he shall live so long*; and, in the mean time, that he be well educated and properly supported, out of the income he derives from his father's estate, and from the interest of this conditional bequest."

The trust of the principal was created by the direction to hold \$40,000 for the benefit of his grandson, to be paid to him when he arrived at the age of twenty-five years, with the increase from accumulation. This clearly was not a trust created for his "support and education." On that alone is

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the commission allowed. The trust created for that purpose was only so much of the interest as was appropriated for it before the grandson was twenty-one. After that the income is not to be paid for support and education, but is to be paid to him absolutely, for any purpose he may choose to use it. The master was clearly right in not charging any commission on the principal of this legacy, as against R. L. Colt, junior.

The question raised by the exception of R. L. Colt, junior, is whether the commission which the executor is clearly entitled to charge on the income expended for education and support while under twenty-one, should be charged against the legacy and deducted from it, or whether it should come out of the estate and fall upon the residuary legatees.

In all cases where the will contains no directions as to commissions or expenses of administration, specific legacies, and bequests of specified sums, are not charged with them, but are paid in full, and the expenses and commissions are taken from the residue, or such assets as are not disposed of. A gift of \$40,000, or the income of \$40,000, would entitle the legatee to the exact amount, without any deduction, if the estate is not exhausted. A testator can charge such legacy, with its proportion of commissions, and other expenses, but for this his directions must be explicit and clear.

In this case, the direction is simply that the executor shall be paid a commission "on the sums he shall pay," not *out* of the sums that he shall pay. There are some reasons for conjecturing that his intention was or might have been that these commissions should be charged to these grandchildren, and not that they should be paid "out of his estate," as he directed the \$10,000 to be paid. But these reasons are not, in my judgment, sufficient to overturn the well settled rule, as against these grandchildren, who receive far less than the fourth part of the estate which would have come to their father by an equal division. I do not feel justified in further reducing their shares, without a more clear declaration of his

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intention than can be gathered from the will. The exception as to this part of the report must be sustained.

Another question submitted for my determination, by agreement of the parties, is, whether the amount due for the funeral expenses of Margaret Colt, a granddaughter of the testator, and the physician's bill in her last illness, can be ordered to be paid out of the estate of the testator, there being no estate of her own out of which these expenses can be paid. She was under the age of eighteen years at her death, in September, 1866. The income of \$20,000, directed to be held in trust for her, had, by order of the court, been expended in her education and support, except \$789, which was the increase by accumulation. The testator directed, if Margaret should die without issue under twenty-five, that the sum of \$20,000 given to her, with the accumulation thereon, be added to his general estate, and considered as part thereof. That estate he gave to three of his children then living. This gift included this sum of \$20,000, and the accumulation on it.

But as the direction was that Margaret should be educated and supported out of this income until she was eighteen, she was entitled to have the whole of the income expended for such support, and there could be no accumulation in the sense in which that word is used in the will, as long as the physician's bill, or any expenses for her in her lifetime, remain unpaid. The medical expenses unpaid, I understand, exceed the surplus of \$789, and of course that must be applied to these expenses. And in case they did not absorb the whole amount, I have no hesitation in including her funeral expenses in this provision for her support and maintenance.

But the principal was not subject to her support and maintenance in case of her dying under twenty-five. It was given over, and the title to the remainder was vested in the legatees to whom it was so given.

If a father does not sufficiently provide for the support of a child, or one to whom he stands *in loco parentis*, the

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courts cannot take from the legacies to others to furnish such support, or pay funeral expenses in case of death. The farthest they have gone is to order, where a legacy is directed to be paid on a future day, with no direction as to interest, that in case of an infant child having no other means of support, interest should be paid on such legacy for the support; presuming that the testator must have so intended. And where a fund is given at a future day to several, with provision that if any die their share should go to the survivors, support for all will be ordered out of the fund; but this is only in cases where all are included in the contingency of advantage from the gift over and of loss by dying before the time specified. And in such case when there is an absolute gift over on the death of all, it will not be ordered unless by consent of the person to whom it is so given. *Greenwell v. Greenwell*, 5 Ves. 194; *Cavendish v. Mercer*, *Ibid.* 195, n. (a); *Fendall v. Nash*, *Ibid.* 197, n. (a); *Evans v. Massey*, 1 Y. & J. 196; *Kime v. Welfitt*, 3 Sim. 533; *Errington v. Chapman*, 12 Ves. 20; *Ex parte Kebble*, 11 Ves. 604; *Errat v. Barlow*, 14 Ves. 202; *In re Davison*, 6 Paige 138; *Ex parte Ryder*, 11 Paige 186.

The case of *Coomes v. Elling*, in 3 Atk. 676, which was urged on the argument as a precedent for funeral expenses, was only as to the orphanage share of the daughter of a freeman of the city of London; this was preserved to her by the custom of London against the will of her father, and by the same custom, on her death under twenty-one went to her brother, and could not be bequeathed, like her other property, by a will executed when over seventeen. It was held that this share went to her brother, liable to her debts and funeral expenses, and that, being property as to which she died intestate, it was, in accordance with the settled rules of administration, liable to them, before the property as to which her will was valid, or the legatory property, as it is called in the report. By the custom, a freeman can bequeath one-third of his effects; one-third goes to his widow, and one-third to his children; and John Coomes, the free-

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man, had left a portion of the third subject to his disposal, to his daughter Mary; this was that called the legatory part.

Had Margaret Colt, at her death, owned absolutely assets which, by reason of her infancy, she could not have bequeathed, these assets would have been liable to her funeral expenses. This is all that is decided in *Coomes v. Elling*.

Loss and others vs. OBRY and wife.

1. To correct deeds for fraud or mistakes in them, is one of the ancient and well established heads of equity jurisdiction, and it is the duty of the court, where such fraud or mistake is clearly proved, to correct it by any means in its power to effect the amendment and the object of it.

2. Mistakes are corrected, even where they occur in the records of proceedings of courts, and exist in the records themselves. This is done, not by reviewing the judgments or proceedings of the courts, but by restraining the parties who may take advantage of such mistakes, from doing so, or by compelling them to execute proper papers for the purpose of such correction.

3. The defendants having refused to correct the mistake in the deeds, after it was brought to their notice, and defended the suit when they knew it was wrong and against good faith to defend it, must pay the costs.

This cause was argued on final hearing, upon the pleadings and proofs.

Mr. Carpenter and *Mr. Ransom*, for complainants.

Mr. Lippincott, for defendants.

THE CHANCELLOR.

The bill is filed to correct and reform two deeds given to the defendants, on account of mistakes in them. One of these deeds was given by the complainant, Anastasia Loss, and the other by Luke Stainsby, the special guardian of Jane C. Loss and Virginia L. Loss, infant children of Anastasia Loss, appointed by this court on her application for the

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sale of their lands. The lands sold were part of the real estate devised to Anastasia Loss and her two children, by the last will of her husband, Charles Loss. Stainsby, the special guardian, was authorized by an order made in this matter, August 8th, 1854, to sell the estate of the infants in a tract of one acre and seventeen one-hundredths, in Hoboken. After this order, Stainsby entered into a written agreement, as special guardian, with the defendants to convey to them by deed, with warranty, a part of the east end of the tract, ninety-nine feet front by one hundred feet deep, fronting on the Hackensack turnpike, being about one-fifth of the whole tract. The price was \$800; \$200 to be paid in cash, the residue to be secured by bond and mortgage at three years, with interest. This agreement was dated July 26th, 1855.

In the report of this sale made to the court, it is stated that the whole tract of one and seventeen one-hundredth acres, was sold for the price of \$800; in other respects the terms of sale were reported according to the written agreement. This sale, as reported, was confirmed by the Chancellor, and on the 1st day of September, 1855, Stainsby, as special guardian, executed a deed to the defendants for the whole tract. And the complainant, Anastasia Loss, on the same day, executed a deed to the defendants, a conveyance by release, of all her estate in said tract.

The mistake complained of, is that these papers, to wit, the report of sale, confirmation, guardian's deed, and the release of Anastasia Loss, in the description, by metes and bounds, of the lands sold, give the bounds of the whole tract authorized to be sold, instead of the part of it included in the agreement for sale. This is alleged to be the mistake of the solicitor or the clerk of the solicitor, who drew these papers.

The defendants, in June, 1856, made another purchase of Stainsby, as special guardian, of a part of the whole tract, adjoining the lot of one hundred feet deep, at the east end, described in the written agreement of July 26th, 1855, which carried their land back to Luke street, a street by which the

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whole tract was intersected, at about one-third of the distance from the front to the rear, and gave them the whole of the tract east of Luke street. The sale was reported to, and confirmed by the court, and the defendants accepted the deed, paid the price agreed upon, and entered in possession of the land to Luke street. This purchase is strong and apparently clear proof that the defendants understood that the first purchase and conveyance to them was of the east part of the lot of one hundred feet deep, and that only. There is, besides the written agreement and this purchase, much other proof of this mistake.

The proof is, in my opinion, not only sufficient, but irresistible and conclusive, that the description of the whole lot was inserted in the report, confirmation, conveyance, and release, by mistake and inadvertence, instead of the part described in the agreement for sale, and that these papers were signed and executed by the parties under the mistaken impression that the description in them only included the one hundred feet of the east end. The residue of the whole tract, west of Luke street, was afterwards sold by the special guardian and Mrs. Loss to other purchasers, who all joined as complainants in the bill. These sales were known to the defendants, who did not interfere or claim title to these parcels. This passive acquiescence may not estop them, but it is cogent evidence against them as to their understanding of the decree.

To correct deeds for fraud or mistakes in them, is one of the ancient and well established heads of equity jurisdiction, and it is the duty of the court where such fraud or mistake is clearly proved, to correct it by any means in its power to effect the amendment and the object of it.

The authorities are numerous and uniform which establish this principle. 1 *Story's Eq. Jur.*, §§ 152—160. Lord Hardwicke recognized and acted upon it in *Baker v. Paine*, 1 *Ves., sen.*, 457; *Henkle v. Royal Exchange Assurance Co.*, *Ibid.* 317, and *Motteux v. London Assurance Co.*, 1 *Atk.* 545.

The Supreme Court of the United States, in *Bradford v.*

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The Union Bank of Tennessee, 13 *How.* 57 ; Chancellor Kent, in *Gillespie v. Moon*, 2 *J. C. R.* 585, and in *DeRiemer v. Cantillon*, 4 *J. C. R.* 85 ; Chancellor Green, in this court, in *Waldron v. Letson*, 2 *McCarter* 126, and Chief Justice Beasley, sitting for the Chancellor, in *Firmstone v. De Camp*, 2 *C. E. Green* 317, have sanctioned and acted upon it. And such mistakes are more readily corrected where there is a preliminary agreement in writing, by which to correct them.

Mistakes are corrected even where they occur in the records or proceedings of courts, and exist in the records themselves. This will be done, not by reviewing the judgments or proceedings of these courts, but by restraining the parties who may take advantage of such mistakes from doing so, or by compelling them to execute proper papers for the purpose of such correction. 1 *Story's Eq. Jur.*, § 166 ; *Jeremy's Eq. Jur.* 492 ; *Barnesley v. Powell*, 1 *Ves., sen.*, 119, 284, 289 ; *De Riemer v. Cantillon*, and *Waldron v. Letson*, *supra*.

In this case the mistake can be corrected most effectually and simply, by the defendants executing to each of the complainants who have purchased parts of said tract, west of Luke street, or who would have title to such parts if such mistake had not been made, deeds conveying and releasing to each of them, respectively, the part so purchased by each.

The mistake in this case was not made by any fault or fraud of the defendants, but by the carelessness and negligence of the solicitor of the special guardian, and of Mrs. Loss. Neither could have read the report, the deed, or the release ; or the mistake would certainly have been discovered. Had the defendants been guilty of no other wrong, it would have been equitable that the complainants should have been paid the costs of this suit. But the defendants, after the mistake was brought to their notice, have refused to correct it, and have pertinaciously defended this suit, when I am fully convinced they knew it was wrong, and against good faith to defend it. This defence was an attempt at fraud. For this it is right that they should be condemned in the costs.

Stockton v. Dundee Manufacturing Co.

STOCKTON, trustee, vs. THE DUNDEE MANUFACTURING
COMPANY.

1. The law as to the effect and constitutionality of acts of Congress must be received by the state courts, as it may be from time to time determined and declared by the Supreme Court of the United States. Hence, under the recent decision of that court, declaring the act of 1862, making the notes of the Government a legal tender for all debts, constitutional, a mortgage made before the passage of that act is payable in such notes.

2. A change in the law, by decision, is retrospective, and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it. Hence, a tender having been made in United States notes before the commencement of this suit, the mortgage debt must be considered as legally tendered.

3. But a tender of the mortgage debt does not, in this state, discharge the lien of the mortgage.

4. The money not having been paid into court, or kept on hand uninvested since the tender, the mortgagors are not discharged from the interest.

5. Defendants allowed sixty days to pay the mortgage debt, with interest; if paid within that time, no costs will be allowed; if not paid, there must be a decree for the sale of the mortgaged premises, for the debt, with interest and costs.

This case was argued on final hearing, upon bill, answer, and proofs.

Mr. C. S. Green, for complainant.

Mr. B. F. Chetwood, for defendants.

THE CHANCELLOR.

This suit is for the foreclosure of a mortgage given in 1858. By the law, as it stood at the commencement of the suit, and at the argument, this mortgage could only be paid by gold or silver coin, unless its effect had been changed by agreement between the parties. The contention on the part of the defendants was, that it is so changed. But the decision of the Supreme Court of the United States, in *Hepburn v. Griswold*, which held that debts con—

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tracted previous to the passage of the legal tender act in February, 1862, must be paid in coin, has been changed by a recent decision in that court. The new decision of that court declares the act of 1862, making the notes of the Government a legal tender for all debts, is constitutional and binding upon the citizens of the states. The law as to the effect and constitutionality of acts of Congress, must be received by the state courts, as it may be from time to time determined and declared by that court. And, although the judges, or the opinions of the judges, of the state courts may not have changed, yet they are bound to give effect to that law, as last declared by the Supreme Court of the United States, however changed by the change of the judges of that court, or the changes in their opinions. What was declared by this court to be the law in *Martin's Executors v. Martin*, 5 C. E. Green 421, was then the law. Now it is changed; as much changed as the law of this state would be by statute, but not in the same manner. A change by statute is only for the future. A change by decision is retrospective, and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it.

As the law now is, the defendant is entitled to pay this mortgage in what are known as legal tender notes, and as the decision relates back to the time when the tender was made in such notes, it must be considered for the purposes of this suit, that the mortgage debt was legally tendered before its commencement.

But a tender of the mortgage debt does not, in this state, discharge the lien of the mortgage, and was so determined by the Court of Appeals, in *Shields v. Lozear*, 5 Vroom 496. And as the defendants have not paid the money into court, and it does not appear that they have kept it on hand uninvested since the tender, they are not discharged from the interest. The defendants must be allowed to pay the mortgage debt, and the interest in arrear, in legal tender notes, at any time within sixty days; if not paid within that time, there must be a decree for the sale of the mortgaged prem-

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ises for the debt, with interest and costs. If the debt is paid within that time, I think it is a proper case for the exercise of the discretion given to me on that subject, by declaring that neither party shall recover costs.

THE MERCHANTS NATIONAL BANK OF NEWTON vs. NORTH-
RUP AND NORTHRUP.

1. It is not sufficient to set aside a deed made by the grantor when in failing circumstances, that his object was fraudulent; it must be shown that the grantor participated in that intent, or had knowledge of the object of the grantor, or of such facts as should have put him upon inquiry as to that object.

2. The mere fact that the grantee has heard of the grantor's suspension or failure in business, or of his being sued, is not in all cases sufficient to make a sale fraudulent or the deed void.

The complainant asks to have a deed given by the defendant, M. B. Northrup, to the defendant, W. S. Northrup, for a lot of land in Newton, set aside, on the ground that it was a fraudulent conveyance, made to hinder and delay creditors, and without consideration. The complainant was a creditor of M. B. Northrup, and obtained judgment against him in the Sussex Circuit Court, on the 18th day of June, 1869, on a suit commenced May 15th, 1869. The lot in question was levied on and sold to the complainant under an execution upon that judgment. The deed to W. S. Northrup was dated and delivered June 1st, 1869, pending that suit.

The grounds on which the complainant alleges the deed to be fraudulent, are, first, that it was made without consideration, and secondly, that it was made to defraud and delay the creditors of M. B. Northrup, who was at the time insolvent, and had failed, and that this was known to W. S. Northrup at the time.

The defendants answer separately, and both under oath.

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as required. Both deny that the deed was without consideration, and answer that \$800, the consideration named in the deed, was actually paid in good faith, at the delivery of the deed, and retained by the grantor. Both deny that the conveyance was for the purpose of delaying or defrauding creditors. M. B. Northrup admits that he had failed, and was insolvent at the time; W. S. Northrup denies that he knew that M. B. Northrup had failed, or was insolvent.

This cause was argued, upon final hearing, upon the pleadings and proofs.

Mr. Coult and *Mr. R. Hamilton*, for complainant.

Mr. Linn, for defendants.

THE CHANCELLOR.

The evidence shows that M. B. Northrup was insolvent at the time of this conveyance, that he had mortgaged the greater part of his property to raise money to pay debts, and to secure other debts, and that there remained several thousand dollars of debts which were unpaid and unsecured. That the lot in question was the only property, of any value, which he had left that was unincumbered. That he had refused to include it in the mortgage given to the Sussex Bank, his chief creditor, to which he had mortgaged the largest part of his estate, saying that he intended to reserve this for himself, or for other purposes. He had offered to convey it to the complainant for \$1100, if they would pay him, in cash, \$300, the excess over his debt to the complainant, and to allow \$800, the amount of that debt, to be retained for its payment. The complainant declined, because its officers knew of his insolvency, and feared that bankruptcy proceedings might make such sale void.

The real value of the lot was about \$1100 or \$1200. M. B. Northrup offered it for \$800, being anxious to obtain the cash for his own purposes, before it should be levied upon, or he prevented from selling by proceedings in bankruptcy. It is possible that his object in exerting himself to effect the

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sale, and obtain the money, was to pay bona fide debts that he desired to prefer, or some other honest purpose. But so far as he is concerned, his conduct and declarations indicate that his object was to protect this lot, or its value from his creditors.

It is not sufficient for the purpose of setting aside a conveyance like this, that the object of the grantor was fraudulent; it must be shown that the grantee participated in that intent, or had knowledge of the object of the grantor, or of such facts as should have put him upon inquiry as to that object.

M. B. Northrup had for some years carried on a large and successful business at Newton. W. S. Northrup was the son of his half brother, and had been in his employ in his mill for some years, but had left four or five years before 1869, and was living on a farm about eight miles from Newton, and was in the habit of coming to Newton to sell produce occasionally, once a fortnight or oftener.

There is no direct proof whatever to overcome the responsive answers, that the consideration of this conveyance was in good faith paid, at the delivery of the deed. The defendant, W. S. Northrup, was examined as a witness, and again swears to the fact, and the details of the manner and place where it was paid. Circumstances are relied on to throw doubt on this testimony. It may, and does seem strange, that a farmer coming to market, should carry over \$800 in bills in his pocket, with no definite object in view. But facts stranger than this constantly come under observation, or are developed beyond doubt by evidence in suits before us. And no judge or juror is justified in disregarding positive testimony, especially when uncontradicted, because it seems to him, on the whole, rather improbable.

W. S. Northrup knew the lot well; he had been employed for years on the adjoining premises, and, if a person of ordinary capacity, must have known its value, and that it was a good bargain, for the price at which it was offered. He saw that his uncle was very anxious to sell for cash, and as he had

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the cash, it was natural that he should take advantage of this desire, and make the purchase. And it is possible that he might confide in the assurance of his uncle, that there was no encumbrance. Such confidence, once very general, still continues in some of the rural and less enlightened parts of the state.

Upon the question whether he knew of the failure of his uncle, the circumstances proved throw much greater doubt upon his allegations in his answer and testimony. The inability of M. B. Northrup to pay his debts, became known to many in Newton between May 10th and May 15th. He stopped payment. He himself denies his insolvency, and it is not improbable that he was solvent, except in ability to pay in cash. He testifies that his assets exceeded his debts. But he had actually stopped, and the public impression was that he was insolvent. Several of the neighbors of W. S. Northrup testify that they heard of his failure in April or May. It seems probable that W. S. Northrup, living only eight miles from Newton, and going there once in two weeks, would have heard of the failure of his uncle within two or three weeks after it became known. Yet it is very possible that he may have been once in Newton within that time without hearing of it; and a farmer cultivating several hundred acres at this distance from a town, might, in the busy month of May, have been so occupied on his farm as not to be in the way of neighborhood rumors. There is no direct evidence that he knew of it, except that of a laborer employed on his farm, who says he heard him speak of it in April or May, but who afterwards says it may have been in June. Very little reliance can be placed upon the testimony of a witness who speaks as to time, of a matter like such a rumor more than a year after it occurred. And the fact that the officers of the bank in the same town, which was his principal creditor, who no doubt had the well known vigilance of their class, did not know it until after the 10th of May, convinces me that this witness and the other witnesses who speak of its being notorious in April or the

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beginning of May, all partake of the inaccuracy common to the most honest witnesses, who speak of dates from recollection, without any fact or transaction to fix them. I can, without the slightest suspicion of their integrity, conceive that many of these witnesses may not have heard these reports of failure until June, or the last week in May at least, which would make W. S. Northrup's evidence less improbable. I do not think the proof sufficient to overcome his positive oath that he had not heard of the failure before he purchased this lot.

But the mere fact of having heard of suspension or failure, or being sued, is not sufficient in all cases to make a sale fraudulent and the deed void; in bankrupt proceedings it is.

Had it appeared that M. B. Northrup had told his nephew that he had failed, had sold his personal property, mortgaged his real estate, and that the constable had an execution against him, that he had left this lot unincumbered, which he was willing to sell at a low price to raise some money for his pressing necessities, I am by no means satisfied that this, either alone or connected with the other circumstances in this case, would be sufficient to make this conveyance void as against creditors.

There are many objects for which a debtor when pressed in failing circumstances, may legitimately sell or dispose of his real and personal property, or pay out his money, and such disposition or payment be valid, except so far as prohibited by the provisions of the bankrupt law, which are not in question here.

The complainant has not shown a case from which I can determine that this deed is fraudulent as against creditors.

Nichols v. Williams.

NICHOLS vs. WILLIAMS.

1. In equity all suits must be in the name of the party really interested, and where the name of an agent or trustee is used, the *cestui que trust* must be made complainant with him.

2. A corporation is a necessary party to a suit in equity, brought in the name of the president, to enforce a contract signed by him as president and on behalf of the corporation.

3. A contract to give in part payment for the purchase of lands, two mortgages, without stating when they were to be paid, whether with or without interest, or at what rate of interest, is the same, practically, as a contract to pay a certain sum on *terms or credits* to be arranged between the parties, and will not be enforced for uncertainty.

4. Specific performance will not be decreed of any contract, when any material part of the terms or conditions are uncertain.

The bill states that the complainant, Nichols, on the 5th day of April, 1870, being president of the Trades Manufacturing Company, acting on its behalf and as its president, as was well known to the defendant, made a contract in writing with the defendant, Williams, which the complainant executed as president of that company, and by its authority, and that he thereby agreed with the defendant to convey to him certain lands of the company for the price of \$150,000; and that Williams agreed to pay that sum by conveying four tracts of land specified, subject to certain mortgages, and valued at \$90,500 above the mortgages, and by executing two mortgages upon the property conveyed to him, one for \$50,000, and the other for \$9500. It was not stated when these mortgages were to be payable, or whether with or without interest, or at what rate of interest; nor was it stated in the bill to whom they were to be made, except by stating that they were to be in favor of and for the benefit of the party of the first part to the agreement; the bill not stating who was the party of the first part. The parties bound themselves to perform all and singular the covenants and agreements so entered into, and agreed to pay, upon fail-

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are to perform the same, \$10000, which they did, by it, fix and settle as liquidated damages for such failure.

The argument in this cause was had upon demurrers filed to the bill. The alleged causes of demurrer were, first, the want of equity in the bill, and secondly, that the Trades Manufacturing Company was not made a party to the bill.

Mr. W. S. Whitehead, Mr. McCarter, and Mr. Blake, for demurrant.

Mr. T. Runyon, for complainant.

THE CHANCELLOR.

In the premises to the bill, it is stated that the suit is brought by Nichols, in behalf of the Trades Manufacturing Company. The company is in no other way made a party to the suit: this does not make it a party. It is not before the court, or under its control.

In this case Nichols, the complainant, has no interest in the suit, or in the contract. The real party in interest is the company; it is so expressly stated in the bill, which contains the allegation that Nichols executed the agreement as president of the company, acting for and on behalf of the company, as the defendant knew. An agent cannot bring suit on an agreement made by him for and on behalf of his principal and alleged so to be at the execution of it. Nor can a president of a corporation bring suit in his own name, on an agreement signed by him as president, and entered into on behalf of his corporation. And, in equity, all suits must be in the name of the party really interested, and where the name of an agent or trustee is used, the *cestui que trust* must be made complainants with him. *Fry on Spec. Perf.*, § 147; *Story's Eq. Pl.*, § 209; *Malin v. Malin*, 2 J. C. R. 238; *Douglas v. Horsfall*, 2 Sim. & Stu. 184; *Field v. Maghe*, 5 Paige 539; *Bailey v. Inglee*, 2 Paige 278.

The company is a necessary party to this suit, and the demurrer must be sustained on the ground of its omission.

Specific performance will not be decreed of any contra

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when any material part of the terms or conditions are uncertain. In this case two mortgages for large amounts were to be given, one for \$50,000, the other for \$9500. It is evident that some time was to be given for the payment of these, and probable that some interest was to be allowed. The time and the interest are both material. Neither is settled, both are to be ascertained by subsequent negotiations. A mortgage for \$50,000, payable on demand, or one day after date, or a mortgage conditioned to pay that sum ten years after date, with no mention of interest, or with interest at two or seven per cent., would each comply with the terms of the contract stated in the bill. This is the same, practically, as a contract to pay a certain sum on *terms or credits* to be arranged between the parties. In the case of *McKibbin v. Brown*,¹ *McCarter* 13, Chancellor Green refused to decree specific performance of the agreement, certain in every other respect, except that the terms or credits were to be agreed upon by the parties. He construed terms or credits to mean *credits* only. The case of *McKibbin v. Brown* is the application, to facts like these before me, of the well settled doctrine above stated, which that case itself, and the authorities cited in the opinion of the Chancellor, clearly establish. It is very clearly expressed in a passage quoted by the Chancellor, from a judgment of Lord Rosslyn: "I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined." This doctrine was acted on again in this court, in *King v. Ruckman*, 5 *C. E. Green* 316. In that case part of the premises to be conveyed was described in the written agreement by these words: "Also two lots of land in Hackensack township, county of Bergen;" without anything else in the contract to designate or identify them. One of the grounds of the dismissal of the bill was that this description was too uncertain; and, although this judgment was reversed in the Court of Appeals, yet the terms in which the opinion of the court on this point was announced, affirm the doctrine. The court say: "Taking the

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CONTRACT. BILL, AND ANSWER TOGETHER. IT CAN BE MADE TO APPEAR WITH SUFFICIENT CERTAINTY, WITHOUT RESORTING TO PAROL EVIDENCE, WHAT LANDS WERE INTENDED." IN THAT CASE THE CERTAINTY IN THE CONTRACT WAS NOT HELD TO BE IMMATERIAL, BUT THAT THE UNCERTAINTY WAS REMOVED BY THE ALLEGATIONS IN THE BILL AND ANSWER.

IN THIS CASE THERE IS NO ALLEGATION IN THE BILL ON THIS MATTER. THERE IS NOTHING BY WHICH THE COURT CAN JUDGE EVEN WHAT TERMS AS TO CREDIT AND INTEREST THE COMPLAINANT INSISTS UPON.

THE VIEW TAKEN OF THESE TWO CAUSES OF DEMURRER, MAKES IT UNNECESSARY TO CONSIDER THE OTHER QUESTION, WHETHER THE \$10,000 STIPULATED FOR, MUST BE CONSIDERED AS STIPULATED DAMAGES OR AS A PENALTY.

THE DEMURRERS MUST BE SUSTAINED.

WUESTHOFF vs. SEYMOUR and WHEELOCK.

1. A CONVEYANCE OF LANDS DESCRIBED BY COURSES, WITH THE ADDITION OF THE WORDS, "BEING THE SAME PREMISES CONVEYED TO K, THE GRANTOR, BY N, BY DEED DATED," &c., WILL CONVEY THE WHOLE PREMISES IN THAT DEED, ALTHOUGH THE DESCRIPTION LEAVES OUT A SMALL STRIP, SUCH BEING THE EVIDENT INTENTION OF THE PARTIES.

2. A REPRESENTATION THAT A PUBLIC ALLEY OVER PART OF THE PREMISES, IS ONLY A PRIVATE RIGHT OF WAY IN A FEW PERSONS, WHEN MADE BY MISTAKE, AND WHEN THE RIGHTS IN THE PROPERTY ARE SUBSTANTIALLY THE SAME IN EITHER CASE, IS NOT SUCH A MISREPRESENTATION AS WILL BAR SPECIFIC PERFORMANCE.

Argued upon bill and answer.

Mr. Kearsbey, for complainant.

Mr. T. Runyon, for defendants.

THE CHANCELLOR.

THE HEARING BEING UPON BILL AND ANSWER ONLY, WITHOUT REPLICATION OR PROOFS, THE FACTS MUST BE TAKEN AS STATED IN

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the answer. The bill is to compel specific performance by the defendants of a contract to purchase lands in Newark. The answer admits the contract, and claims that the defendants are not bound to perform it, because the complainant has no title to part of the alley, parcel of the premises to be conveyed, and because the complainant, at the sale, misrepresented the premises in a material matter, which is, that he said the alley was only subject to the right of way of W. K. and two or three other persons, who were not named, and that the defendants would have the right to have and maintain under the alley, the steam boiler which was then there, and would have the right to build over the alley, when, in fact, the said alley was a public highway, and the defendants would have no right to keep their boiler under it, or to build over it.

The property in question is a brick house and lot on the west side of Lawrence street, in Newark, one hundred feet south of Market street, together with an alley ten feet wide, along the south side of the lot, which is twenty-five feet wide, and sixty feet deep. This lot, with the adjoining part of the alley, six feet wide, on Lawrence street, and two feet wide in the rear, was conveyed to the complainant by Emma Littell, and there is no dispute about the title to the fee in that part of the alley. The residue of the alley, being the south side, was conveyed by U. H. Nutman, whose title is admitted, to Kirk and Kirkpatrick, partners, by deed recorded in Book K 10, of Deeds, for Essex county, page 380, in a deed for the lot adjoining the alley on the south.

When Littell owned the lot north of the alley, and Kirk and Kirkpatrick the south lot, and J. and S. Ives the lot in the rear, they all agreed that this alley of ten feet wide should be opened and dedicated for public use, as a public highway, and it was accordingly actually opened and used as a public highway for more than ten years. Upon Kirkpatrick's death, in the division of the partnership property, the Nutman lot was set off to his heirs and representatives, and Kirk conveyed his moiety of it to them, by deed dated

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January 1st, 1862. This deed, in describing the property, gives as the north boundary, a line drawn parallel to and exactly ten feet south of the south side of the brick building on the Littell lot, thus in the boundary excluding the lane; but there is added to this description by metes and bounds, "being the same premises conveyed to said Kirk and Kirkpatrick, by U. H. Nutman, by deed recorded in Book K 10, page 380," &c. The metes and bounds called for do not include this south part of the lane, but the deed to which reference is had does include it. The two descriptions of this property thus given in this deed, do not agree. And the question is, which of the two must be taken. Each description is certain, definite, and complete, if it stood alone. There is a latent ambiguity, which does not appear on the face of the deed, but by extrinsic facts which show that these two descriptions differ. This ambiguity, like other latent ambiguities, can be solved by ascertaining the intention of the parties from the situation of the property. The part in dispute is, in the first place, a gore of land situate in a public highway, and so small as of itself to be of no use or value if not in a highway. It was a part of the partnership property, then being divided, and if not in this deed, remained undivided, and the only share retained by Kirk would be an undivided half part of this gore, or half of the lane. The plain inference from these facts would be that this deed was intended to convey or release all the interest of Kirk in the premises conveyed by Nutman, to the heirs and widow of Kirkpatrick. This view is made stronger by the fact that the part in dispute, except a very small gore, is south of the middle of the lane, and by the rule now established, that where lands bounding on a highway are conveyed by a deed which does not, by its terms, exclude the street, it shall be held to convey to the middle of the street, on the theory that the grantor is not to be presumed to retain title to the part in the street, unless he has expressed such intention. This rule would, by the theory on which it

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is adopted, extend to the line in the street to which the title of the grantor extends, even if beyond the middle.

For these reasons, I am of opinion that the complainant has title to the land in the alley, subject to the easement of a public highway over the same.

The contract or agreement to convey, describes this part of the premises as "all the said alley adjoining the said premises, excepting the right of way, which others have of passing over said alley." The complainant represented that this alley was a private way, and that Kirk and two or three others not named, were the only persons who had a right of way over it.

The description in the agreement of the easement, by calling it "the right of way which others have of passing over said alley," although, perhaps, more appropriate to designate the incorporeal hereditament known as a private way, yet is sufficient to designate a public highway. A public highway is simply a right for all citizens to pass over it. And I do not think that it is a good defence against the performance of this contract, that the right so excepted is a public highway, and not a private right of way.

The representations made by the complainant at the agreement, are a different matter. He said it was only a private way in Kirk and a few others. This is a clear misrepresentation, perhaps unintentional, yet if it is of a matter that materially affects the value or use of the property, it bars the complainant's right to a specific performance. In this case there is no allegation of fraudulent intention. Then, as a misrepresentation without fraud, by mistake or inadvertence, or ignorance of a matter not material, will unquestionably not bar the right to specific performance, the question remains whether this is such a material misrepresentation. The part of the representation which refers to the right to have a boiler under, and to build over the alley, is a mere opinion as to the legal right, which the defendants were bound to know, and for which they cannot be considered as relying on the complainant. If the vendor of a lot tells a

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purchaser that he has a right to build a shop upon the sidewalk in front, it is an error as to the legal right, but cannot, in an action for specific performance, be treated as a misrepresentation, which must be of fact. But if the fact that this alley was a public highway, would deprive the defendants of rights which they would have had if it was only a private way, as represented, then the misrepresentation is of a very material matter, which must bar the complainant in this suit.

The owner of the land over which a public highway runs, is entitled to every use of it, and of all above and below its surface, which is not inconsistent with the free use of it as a highway for the passage of all citizens over it. Lord Mansfield, in *Goodtitle v. Alker*, 1 Burr. 133, quoting from 1 Roll. Abr. 392, letter B, pl. 1, 2, says: "That the King has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil; so do all the trees upon it, and the mines under it, which may be extremely valuable. The owner may carry water in pipes under it." In that case it was held that the owner could maintain ejectment for it, or trespass for an injury upon it. This doctrine has since been universally recognized as law. In *Winter v. Peterson*, 4 Zab. 524, the Supreme Court of this state held that the owner of lands bounded by a public highway, and who was therefore considered as owning to the middle thereof, might maintain trespass against an overseer of the highway for cutting down a tree standing in the highway, which was not required to be cut for the convenient use of the road by the public. And in *Wright v. Carter*, 3 Dutcher 76, the same court held that ejectment would lie by the owner of the fee, for lands in a highway occupied for other purposes. And the Court of Errors, in reviewing that case, held that building a toll-house was such improper occupation, and gave judgment for the owner to recover the land occupied by it. The only limitation of the use of the land is, that such use shall not interfere with the free passage of the public over it. The owner may put a vault or boiler under a public highway,

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if it does not interfere with the use of the highway. In an alley of ten feet wide, it might not be possible to remove, or repair, or replace the boiler, without interrupting the use of the road by the public. But the same difficulty precisely would arise if it was a private way. He would have no right to interrupt the owners of the right. In one case the remedy is by indictment, in the other, by civil suit. It may be questioned which is most severe. But the question before me is as to the right, not as to the remedy, and I am of opinion that the defendants would have precisely the same rights in this alley if it is a public highway, as if it was subject to a private right of way only. The right of building over it is the same in one case as the other. A building which does not interrupt the passage over it or so darken it as to injure the usefulness of it or its repairs, might perhaps, be extended over either. It is not necessary to decide whether it could or could not, but if it could be extended over a private way, it could over a highway. If so, the misrepresentation was not material.

The defendants, at making the agreement, were fairly apprised that there was a right of way by a number of persons over this alley, and they were bound to know the legal consequences of such right upon their use of the land. And if these consequences are not more injurious in the case of a highway, and the misrepresentation was not fraudulent, it will not in equity bar the enforcement of the agreement by specific performance.

American Ice Machine Co. v. Paterson Steam Fire Engine & Machine Co.

THE AMERICAN ICE MACHINE COMPANY vs. THE PATERSON
STEAM FIRE ENGINE AND MACHINE COMPANY, AND
HAYES.

The defendants contracted with the complainants to construct an ice machine. It was to be finished, and to be put up in working order ready for trial in six weeks; the payments to be \$300 a week for the first and second weeks, and \$400 a week thereafter, until finished, provided the work was satisfactory to the complainants, and the balance at a time specified. The machine was not ready for trial on the day named. The complainants then extended the time twelve days. At that time a trial was had, but the machine proved defective in essential particulars. While the machine was in this situation the Paterson Company, having become insolvent, assigned all its property to Hayes for the payment of its debts under the provisions of the Assignment Act. Hayes did not cause the machine to be completed, but issued an attachment for the balance remaining unpaid. The machine was attached and ordered to be sold. The extension of time made no provision for payment during that time. The defendants contend that they are entitled to \$400 a week for such extended time. The contract further provided that if the machine was not ready for trial in six weeks, a penalty of \$50 for each day's default, as liquidated damages, should be deducted from the price.

Held, that the claim for penalties during the twelve days' extension could not be sustained; the extension of the time waived the penalties during the extension. That if it is assumed that the weekly payments applied to the extended time, it must also be assumed that the condition that the work should be satisfactory was extended to these payments. That the defendants having neglected to complete and deliver the machine, the complainants had a right to regard the contract as rescinded, and to demand back the money paid. They are consequently creditors of the defendants entitled to proceed against them under the act to prevent frauds by incorporated companies. That the defendants being insolvent at the time of the assignment to Hayes, that assignment is void, though made for the benefit of creditors. All proceedings in the attachment suit restrained, and the creditors and assignee of the Paterson Company restrained from proceeding with its business and disposing of its effects. Receiver to be appointed.

This matter was argued upon a rule to show cause why an injunction should not issue to restrain the corporate defendant as an insolvent corporation, from alienating its property, and to restrain the defendant, Robert Hayes, to whom that company had assigned its property, as general assignee, for

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the benefit of its creditors, after it became insolvent, from proceeding in a suit at law commenced by attachment against the complainant, and to restrain him and the auditor in attachment from selling certain machines attached as the property of the complainant, under an order to sell them, pending the attachment, as perishable property.

Mr. J. F. Randolph, junior, in support of the rule.

Mr. A. B. Woodruff, contra.

THE CHANCELLOR.

The defendant company contracted with the complainant to construct for it an ice machine, according to plans and specifications. It was to be finished perfect in all its parts, and to be put up in working order ready for trial in six weeks, and after trial, to be properly boxed and packed for shipment, and placed on board the cars, for the sum of \$4500; the payments to be \$300 a week for the first and second weeks, and \$400 a week thereafter, until finished, provided the work was satisfactory to the complainants, and the balance when the machine was placed in the cars.

The machine was not ready for trial on the 27th day of June, when the six weeks expired; on that day the complainant extended the time for finishing it for trial to July 9th. At the last mentioned time a trial was had, and the machine succeeded in making ice, but it was not satisfactory to the complainant; the tank, a cast iron vessel, an essential part of the machine, which should have been air tight, was cracked, and leaked, and the reservoir, another essential part, was imperfect and defective. These were defects which justified the complainant in being dissatisfied. They were never remedied by the Paterson Company, or their assignee, though an offer was made, but not accepted, to allow from \$400 to \$600, the value of these parts, to be deducted from the price.

While the machine was in this situation, the Paterson

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Company on the 19th of August, it then being insolvent assigned all its property to the defendant, Hayes, for the payment of its debts under the provisions of the Assignmen Act. Hayes did not cause the machine to be completed or delivered, as required by the contract, but issued an attachment at law for the balance of the \$4500 remaining unpaid under this, the machine was taken and attached, and was ordered to be sold as perishable property, although consisting of iron castings, on account of some daily expenses incurred for its storage.

The complainant had paid installments under the agreement, in cash and its equivalent, \$2300. This is \$200 more than was required by the original contract to be paid before the machine was ready for trial, if it had been ready in the six weeks stipulated in the contract. The extension of time made no provision as to payment during that extension, but the defendants contend that the provisions of the original contract, that \$400 a week should be paid until the machine was finished, applied to such extended time, and that the complainant had violated his contract by not making the weekly payments during the extension.

The contract provides that if the machine should not be ready for trial in six weeks from date, a penalty of \$50 for each day's default, as liquidated damages, should be deducted from the price.

The first question raised is, whether the complainant is a creditor of the defendant corporation, so as to be entitled to proceed against it under the act to prevent frauds by incorporated companies. The claim for penalties during the twelve days of extension cannot be sustained; the extension of the time for fulfilling a contract, waives the penalties during the time covered by the extension, though it does not as to the time after the extension expired. If it is assumed that the terms of weekly payment applied to the time for which the contract was extended, it must also be assumed that the condition was extended to these payments, which is, that the work should be satisfactory.

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The complainant was not satisfied with the work, and it was such as it ought not to be satisfied with. It was not bound to make further payment until after the machine was finished, as the contract stipulated, if at all. Had the machine been delivered and accepted in its unfinished state, payment could have been compelled upon a *quantum meruit*. But upon no principle of law or equity could the complainant have been compelled to accept it in the condition in which it remained, much less have been compelled to pay for it without delivery or receiving anything of value for the price. But if the Paterson Company refused or neglected to complete and deliver it, the complainant had a right to regard the contract as rescinded, and to demand back the money paid. In this view it must be considered as a creditor of the Paterson Company. That company has both the complainant's money and its machine. That company is in fault and the complainant is not. The money or the machine is due to the complainant, and it must be considered as a creditor entitled to call for an injunction and a receiver as against the Paterson Company. The insolvency of that company is both proved and admitted by the answer.

Another question which arises and was discussed, is whether the assignment to the defendant, Hayes, is valid, or whether it is made void by the second section of the act relating to insolvent corporations. That section provides that the directors of a company when insolvent, or in contemplation of insolvency, shall not make any sale, transfer, or assignment of its property, and that such assignment shall be void as against its creditors. And in the fifth section it provides that when an incorporated company shall become insolvent, the Chancellor may enjoin the directors from going on with the business, and appoint a receiver to manage and settle its affairs. The evident intention of this act is to provide that the whole affairs of an insolvent corporation shall be settled in this court, and under its direction, and not by assignees selected by the company or its directors. For this purpose it was necessary that any conveyance or transfer by

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the company when insolvent, or in contemplation of insolvency, should be declared void. The words of the act clearly apply to assignments for the benefit of creditors, and the objects to be attained require that courts should give effect to these words in their proper meaning.

The courts of New York have decided that like words in the statute of that state on this subject, make void assignments to trustees for the benefit of creditors. *Bowen v. Lease*, 5 *Hill* 221; *Harris v. Thompson*, 15 *Barb.* 62.

The complainant is entitled to an injunction restraining the directors and Hayes, the assignee, from proceeding with the business of the Paterson Company, and from disposing of its effects, and to have a receiver appointed.

The assignment to Hayes, who commenced the proceedings in attachment, being void, all further proceedings by him or the auditor in that suit must be restrained.

WHITE vs. STRETCH.

W. filed a bill to foreclose a mortgage, dated January 2d, 1868, given to him by S. and wife on lands in Hoboken. The condition of the mortgage was for the payment of the principal in three years, with interest half yearly, with a provision that if not paid within thirty days after it was payable, the principal should be due at the option of the mortgagee. The mortgage was given to secure the purchase money of the premises. The deed contained a covenant that the premises were free from "all assessments and encumbrances of what nature or kind soever." The municipal authorities of Hoboken had constructed a sewer near these premises which was finished before this conveyance, and had assessed upon the premises \$204, as their share of the expenses. These proceedings had been taken to the Supreme Court by certiorari. W. and S., at the date of the deed, entered into an agreement, under hand and seal, that if the Supreme Court should decide the assessment legal and a lien upon the premises, W. should pay the assessment; but if the decision should be in favor of W., he should be held harmless from all charges for building the sewer. The Supreme Court confirmed the proceedings relative to the construction of the sewer prior to the assessment of the expenses on these lots, and set aside the assessment. By the same order they appointed three new commissioners to assess upon these

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lots their share of the expenses of constructing that sewer. They made a new assessment, August 10th, 1869, of \$254. This assessment was confirmed by the common council, September 24th, 1869. The interest due on the mortgage, July 2d, 1869, had been paid. January 2d, 1870, S. served a notice on W. that the assessment had been made anew and confirmed, and unless W. paid it, he should claim a deduction to that amount from the mortgage. W. did not pay it, and S., within the thirty days, tendered to W. the amount of interest due on the principal of the mortgage less the assessment and costs for which the lots were liable. This tender was refused, and the bill was filed to foreclose the mortgage, setting out that the interest not having been paid within the thirty days, the complainant had elected to consider the mortgage as due. S. filed a cross-bill. *Held*, that the agreement not providing for the result of the decision, it does not affect the question between the parties, which must be determined by the effect of the covenant in the deed against assessments and encumbrances. W. must, therefore, relieve the premises from the encumbrance, and S. is entitled to have the amount deducted from his mortgage. That tender of the interest on the balance saved the forfeiture. That the cross-bill was unnecessary to set up defence.

2. A covenant that the premises conveyed are free from "all assessments and encumbrances of what nature or kind soever," binds the grantor to pay off an encumbrance existing at the date of the deed. And in a suit to foreclose the purchase money mortgage, the amount of such encumbrance must be deducted from the amount due on the mortgage, and the decree will be only for the balance.

On bill and cross-bill. Argued upon pleadings and proofs.

Mr. J. H. Lyons, for White.

Mr. Besson, for Stretch and wife.

THE CHANCELLOR.

The original suit by the complainant, White, is to foreclose a mortgage dated January 2d, 1868, given to him by the defendants, Stretch and wife, on lands in Hoboken to secure the payment of \$2000. The condition of the mortgage was for the payment of the principal sum in three years from date; the interest was payable half-yearly, with a proviso that if it should not be paid within thirty days after it was payable, the whole principal should be due at the option of the mortgagee.

The mortgage was to secure the purchase money of the

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The mortgage was to secure the purchase money of the

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mortgaged premises, eight lots in Hoboken. The premises were conveyed by White to Stretch by deed, dated on the same day with the mortgage; this deed contained the usual covenants, including a covenant that the premises were free from "all assessments and encumbrances of what nature or kind soever." The municipal authorities of Hoboken had constructed a sewer near the premises, which was finished before this conveyance, and had assessed upon these lots \$204, as their share of the expenses. This assessment was confirmed March 14th, 1867.

White disputed the legality of the proceedings in constructing this sewer, and also in making the assessment. He had removed the whole proceedings into the Supreme Court, by a certiorari, returnable at the November Term of 1867; and at the conveyance to Stretch, that suit was pending to test the legality of these proceedings. The assessment and controversy were known to Stretch. An agreement between White and Stretch was executed, under their hands and seals, at the same time with the deed, relating to this assessment. By this it was stipulated that if the Supreme Court should decide that the assessment was legal and a lien upon the lots, then White should pay the assessment; but if the decision should be in favor of White, then he should be exonerated and held harmless from all charges for building said sewer.

The Supreme Court, at the Term of February, 1869, confirmed all the proceedings relative to the construction of the sewer, prior to the assessment of the expenses on these lots, and set aside the assessment; and by the same order, appointed three new commissioners to assess upon these lots their share of the expenses of constructing that sewer. These commissioners made a new assessment on the 10th day of August, 1869. They assessed \$254 upon these lots, as their share of the expenses. This assessment was confirmed by the mayor and common council, on the 24th day of September, 1869.

The interest on the mortgage, due on July 2d, 1869, has been paid; and Stretch, on January 2d, 1870, served

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notice on White that the assessment had been made anew and confirmed, and that unless it was paid by White, he should claim a deduction from the bond and mortgage to that amount. White did not pay it; and Stretch, within the thirty days, tendered to White the amount of interest due on the principal sum of \$2000, less the assessment and costs for which the lots were liable. This tender was refused, and the bill was filed to foreclose in April, 1870, setting out that the complainant, because the interest had not been paid within the thirty days, had elected to consider the mortgage as due.

The real question in the cause is, whether White is bound, either by the covenants in the deed or his agreement of even date with it, to pay off the encumbrance of this assessment; if he is, it is well settled that it must be deducted from the amount due on the mortgage, and he can have a decree only for the balance. *Shannon v. Marselis, Saxt.* 426; *Van Riper v. Williams*, 1 *Green's Ch.* 407; *Jaques v. Essler*, 3 *Green's Ch.* 461; *Couse v. Boyles*, *Ibid.* 212; *Woodruff v. Depue*, 1 *McCarter* 168.

It follows, of course, that a tender of interest on the balance was sufficient to avoid a forfeiture of the credit.

The agreement does not appear to me to affect the question; it does not provide for the contingency which has occurred. It provides, first, that if the assessment should be confirmed, White should pay it. It was not confirmed. Secondly, that if the decision should be in favor of White, he should be exonerated. The decision was in his favor as to the assessment or the amount assessed, but was against him as to the most important part, the proceedings for the constructing the sewer; these were confirmed. The effect of this affirmance was to leave these premises subject to the expense of constructing the sewer, which, by that very judgment, were ordered to be re-assessed upon it, and were re-assessed to a large amount. This can hardly be called a decision in favor of White. That agreement did not provide for the case of an affirmance in part, and a reversal in part;

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the case that has occurred. The agreement shows that the costs of constructing this sewer were on the minds of the parties, and that it was their intention that Stretch should have the lot free from this encumbrance, and that if the proceedings should be set aside, White should not be held by the covenant against encumbrance, by reason of the encumbrance existing at the date of the decree.

The question, then, must be determined by the effect of the covenant in the deed against assessments and encumbrances. The assessment was in existence and was an encumbrance at the date of the deed, but if it had been simply set aside, no damages, or at the most mere nominal damages, would have been recovered at law for the breach of this covenant, and in equity no allowance could have been made for it.

But the assessment was merely the mode of ascertaining the share of the cost of the sewer to be paid by these lots; they were liable to pay for the cost of the sewer from the time the proceedings were completed by the confirmation of the first assessment. That liability was the real encumbrance. It existed at the date of the deed, and it was never for a moment removed; the same judgment that set aside the assessment, affirmed the proceedings which created the encumbrance, and affirmed the continuance of that encumbrance by appointing commissioners to ascertain the proportion which each lot should pay. If, then, the cost of this sewer was an encumbrance on these lots at the date of the deed, and that encumbrance has never been removed, but the only change has been that the assessment of the amount, which is the share of these lots, has been changed; the conclusion is inevitable, that White is liable to relieve the premises from it, and Stretch is entitled to have the amount of it deducted from his mortgage.

This conclusion, as to the legal effect of these covenants, leads, I am satisfied, to an equitable and just result as between these parties. The lots were purchased at the advanced price which the completion of a sewer always adds

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to the adjoining lots. White was to pay for the cost, and Stretch to be exempt, because he had given it to White on the price of the lots. If the covenants in the deed, or the stipulations in the agreement had, by inadvertence in drawing them, led to a contrary result, Stretch would have been compelled to put up with the wrong, not because it was equitable that he should do so, but because he had bound himself to do it.

As, according to this view, the mortgage was not due at the time of filing the bill of White, that bill must be dismissed. As the cross-bill of the defendant, Stretch, was unnecessary for the purpose of setting up his defence, it must also be dismissed. In each case the dismissal would ordinarily be made with costs. But here, as it will reach about the same result, I will order both dismissals, without costs on either side.

MCTIGHE and WADLEIGH vs. DEAN.

Money, will not be ordered to be paid into court, which is not ascertained to be due by an account or decree in the cause, or admitted to be due by the answer or other proceedings in the cause. A parol admission proved by affidavit is not sufficient.

On motion for order that defendant pay moneys into court.

Mr. Cloke, in support of the motion.

Mr. Douglass, contra.

THE CHANCELLOR.

The complainants filed their bill to compel the defendant, as their agent, to account for and pay over certain moneys received by him for them. The moneys were collected from three insurance companies, due from them for losses by fire

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of premises for which they had issued policies to the complainants. The only agency of the defendant was to collect and pay over these moneys. There is no answer, and no proceedings in the cause beyond filing the bill.

Assuming that a suit in equity may be maintained for an account against an agent, whose only agency was to collect money and pay it over, where no discovery is needed, the question to be decided is, whether money will be ordered to be paid into court, which is not ascertained to be due by any account or decree in the cause, and which is not admitted to be due by the answer or other proceedings in the cause.

Courts of equity will order a trustee or an agent who holds money collected for his principal, to pay that money into court; but it is only in cases where the money is admitted by the defendant to be in his hands, and to belong to the complainant. This is admitted by the counsel for the complainants, but it is claimed that the order may be made upon admissions by parol, proved by affidavits, and is not confined to admissions in the answer or made in the cause. In this case it is shown by depositions in support of the motion, that the defendant has admitted that he had received the moneys from the insurance companies, and defiantly told the complainants that they might get it as they could. But such admission is not made in any proceeding in the cause. His deposition, read on this motion, states that he is ready to settle with the complainants whenever they will meet him and allow him his expenses and compensation for his services as promised, but does not admit directly that he has received any money; and if an admission that he has received some may be implied, nothing is stated from which any amount can be held as admitted. And on the other hand, this deposition claims that the balance due is yet unsettled.

I know of no precedent for an order to pay money into court on proof by depositions, that the defendant has admitted that he has received, or that he has it. Daniell states the rule to be that to support an order to pay money into court, it is necessary that there should be a clear admission

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by the answer, of the plaintiff's title; and that as, by the changed practice in the Court of Chancery, an answer is not now, in every suit, required as a matter of course, yet now money would not be ordered to be paid in, except upon a clear admission on part of the defendant, though not necessarily contained in the answer. 3 *Daniell's Ch. Pr.* 1829. These admissions must be held to be admissions in the suit.

Lord Cottenham, in the case of *Richardson v. The Bank of England*, 4 *M. & Cr.* 175, in which he states the grounds on which the court acts in ordering moneys to be paid into court, says that "the facts to give authority for such an order must be found admitted in the answer." The ruling in *Dubless v. Flint*, 4 *M. & Cr.* 502, and in *Furman v. Fairlie*, 3 *Mer.* 29, proceed on this ground. Vice-Chancellor Wigram, in *Green v. Pledger*, 3 *Hare* 165, recognizes these principles and acts upon them, but distinguishes that case on the ground that Pledger, who was ordered to pay the money into court, admitted his liability to Angle, a co-defendant, who refused to answer or appear to contest the motion, and as against whom the right of the complainant was shown by affidavits. I am unwilling to extend the rule farther, and to grant such order upon affidavits of the parol admissions of the defendant outside of the suit. It would introduce a precedent fraught with danger.

The motion must be denied.

DAVIDSON vs. THOMPSON.

1. Bill for an account of rents, and for partition of a strip fifty feet long by five feet wide, being the rear boundary line of the lots of the complainant and defendant. Decree, that each party is entitled to the half of the strip which adjoins his own premises, and, if the parties are agreed as to the direction of the line, division will be ordered to be made by a line drawn through the middle of the strip, parallel to, and equally distant from the sides, without the delay or expense of appointing commissioners.

2. A tenant in common is not, in general, accountable to his co-tenants

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for rents ; but when he takes possession of the premises, and excludes his co-tenant and takes the rent therefor, he must account for the rent, deducting expenses for repairs and taxes.

This case was argued on bill, answer, and proofs.

Mr. W. B. Williams, for complainant.

Mr. W. Brinkerhoff, for defendant.

THE CHANCELLOR.

The bill is for partition and an account of rents. ~~The~~ land is a strip of fifty feet long by five feet wide. It ~~is~~ situate in the rear of a lot of the complainant, on Washington street, in Jersey City, and, also, of a lot of the defendant on Montgomery street. It adjoins no street, and would be of little or no value to any one but the complainant or defendant. It would add to the extent or value of the lot of either ; and the half of it adjoining either would add to its value, to the extent of the area thus annexed. Its loss would be no injury to either, beyond the loss of the extent of area. To either, it, or half of it, would simply be an addition of area.

The title, extent, and boundaries are admitted ; and the first question is, whether it ought to be divided or sold. In partition suits, a sale is never ordered unless a partition cannot be made without great prejudice to the interest of the owners, and this must be so determined by the court. I cannot see that a partition of this strip would be any prejudice whatever to the interest of the owners. I am not authorized, therefore, to direct a sale. In this case, each party will be entitled to the half of the lot which adjoins his own premises, and the division must be made by a line drawn through the middle, parallel to, and equally distant from the sides ; and if the parties are agreed as to the direction of this line, such division can be ordered by the decree, without the delay or expense of appointing commissioners.

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The defendant has been in exclusive possession of the whole lot since 1865, and the complainant asks for an account of the rents or annual value. A joint tenant in possession, is accountable to his co-tenants for rents. The rule as to tenants in common is different. A tenant in common is not, in general, liable, unless he has excluded his co-tenant from the premises, or unless he has taken and kept possession of such premises as are not capable of a joint occupation, which is, in effect, an exclusion of his co-tenant. In this case, the defendant took exclusive possession of this strip, by re-building the woodshed on it, and renting it to the tenant of his lot. This is equivalent to excluding the complainant, and he must account for rent, deducting expenses for repairs and taxes. That rent will necessarily be small, only one-half of the amount which this strip may have added to the rent paid by the tenant. If it has not, in fact, increased that rent, the amount to be accounted for will be nothing.

CARR vs. THE PASSAIC LAND IMPROVEMENT AND BUILDING COMPANY.

1. Specific performance will not be enforced where the contract does not designate, with certainty, the lands to be conveyed.

2. A resolution "that two acres be sold," is vague and uncertain upon its face. The uncertainty is patent, and parol proof is inadmissible to explain it.

Argued upon bill, answer, and proof.

Mr. A. B. Woodruff, for complainant.

Mr. H. A. Williams, for defendant.

THE CHANCELLOR.

This cause was before the court in February Term, 1869, on a motion to dissolve the injunction. The opinion then

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delivered, (4 *C. E. Green* 424,) covers the case as now presented. It was founded on the fact that the lands, of which the conveyance was sought, were not designated or described in the resolution of the board of directors of the defendant, set up as the contract to convey, or in any other writing signed by the defendant or its agent. I see no reason to change the opinion then declared, that the writing required by the statute of frauds, must contain a designation of the lands which are contracted to be conveyed.

The authorities are uniform on this subject, and are founded on the clearest principle. *Fry on Spec. Perf.*, 209; *Fish v. Hubbard's Adm'rs*, 21 *Wend.* 652; *Robesc v. Hornbaker*, 2 *Green's Ch.* 60.

The statute might as well be repealed, as to dispense with its provisions as to this most material part of the contract.

The evidence does not change the case in this respect. Any writing signed by the defendant or its agent, and connected with the last resolution of the board, which designated or described the property, would have satisfied the requisitions of the statute. But such writing is requisite to satisfy them. None such is offered. It is proved, by parol, that before this resolution was passed, receiving the report of the committee, Carr had told the members of the board where he wanted the two acres; and I have no doubt that these two acres were intended to be sold to him. But, unfortunately, this could not be gathered from the written resolution. A resolution "that two acres be sold," is, upon its face, vague and uncertain. The vagueness and uncertainty is patent, and no parol proof can be admitted to explain it. A written contract, by a large land owner in London, to sell a lot in that city for £50, might be shown, by parol, to mean a lot worth less than half that sum, or one with a palace upon it worth £50,000; leaving ample room for the very perjury which the statute, by its title, was intended to prevent.

The bill must be dismissed.

Davison v. Perrine.

DAVISON vs. PERRINE.

When a party, under a contract for the conveyance of lands to which the grantor has not the whole title, with a knowledge of this fact, agrees to go into possession until the title can be procured to the whole; and the grantor, being unable to procure the whole title, offers to convey all that he has been able to obtain, and such party refuses to accept the conveyance, and retains possession of the property; upon bill filed by such grantor, to compel the purchase and payment for the lands agreed for, demurrer will not lie to the whole bill. It will be retained for the purpose of putting the defendant to his election, either to accept the title, or to abandon the contract and restore the possession.

The argument in this case was upon general demurrer to the bill.

Mr. Ludlow, in support of the demurrer.

Mr. A. V. Schenck, contra.

THE CHANCELLOR.

The complainant seeks to compel the defendant, specifically to perform the agreement set out in the bill to purchase and pay for the lands agreed for, or to give up possession of the property and account for the proceeds of timber cut and sold by him.

The agreement made in October, 1869, was to give good title to the lands by the 1st of April, 1870. At that time the complainant, who, at the sale, supposed that he had good title to the whole, found that he owned only one undivided sixth. The defendant, with knowledge of this, agreed to go into possession until the complainant could procure title to the whole. The complainant, by the 22d of April, had procured title to three other undivided sixths, and on that day offered to convey these four sixths to the defendant being all the title he could convey. The defendant refused to accept that conveyance, and retains possession of the

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property, and has cut down and sold large quantities of wood and timber growing on the premises. These are the facts, as set forth in the bill, and on demurrer must be taken as true.

The defendant may not be bound to perform this agreement on his part, by accepting this imperfect title. He may be entitled, if he elects to accept this, to compel the complainant to convey it with compensation, and for that purpose to retain possession. But the complainant is not bound to remain quiet until the defendant determines which course he will pursue. He may exhibit his bill in this court for the purpose of putting the defendant to his election, and if he shall refuse to accept the title, to compel him to abandon the contract, and restore the possession. For that purpose, at least, this bill must be retained. And as the demurrer is to the whole bill, it must be overruled.

 PALMER vs. PALMER.

1. If a husband drives his wife from his house, or uses personal violence or brutal treatment towards her, such as to indicate an intention to drive her away, or to render it unsafe to live with him, the leaving his house for these reasons is a desertion by the husband; and if she be allowed to stay away for three years, without solicitation to return and proper assurances of better treatment, it would be a desertion by him sufficient to warrant a divorce.

2. A willful and malicious refusal by a husband to permit a wife, who is discharging her own duties, to share with him such means of support as she may have, may be held to be an expulsion from his home, and constitute a desertion.

3. A failure to provide a sufficient support, or even any support for the wife, does not constitute a desertion by the husband.

4. A divorce is never granted when the only proof of the ground of divorce is the testimony of the complainant.

Palmer v. Palmer.

This cause was submitted on the bill and ex parte proofs, and report of the special master.

Mr. M. B. Taylor, for complainant.

THE CHANCELLOR.

The bill is filed for a divorce on account of desertion for ~~ree~~ years. The defendant is a lawyer, practicing in New ~~ork~~, and has never, so far as appears, resided in New ~~rsey~~. The parties were married in the city of Philadelphia, where they resided for the three years next succeeding ~~eir~~ marriage; the complainant then left her husband ~~cause~~ he did not provide any home for her, and resided ~~o~~ years with her father at Camden. Then they went to ~~ew~~ York, where they lived together for three years. At ~~e~~ end of that period, in October, 1867, she left her husband and went to reside with her father in Camden, where ~~e~~ continued to reside until the filing of the bill, December ~~th~~, 1867, and still continues to reside. The reason for her ~~aving~~ him is given in her testimony in these words: "I ~~me~~ home to my father at that time because it was necessary for my support; my husband had ceased to take care ~~me~~, and I could not remain in New York without becoming absolutely destitute. My husband had a law office ~~in~~ New York, and professed to practice law there; we were ~~boarding~~; during the last year he did nothing at all for me; I lived with him as long as I could, getting money from ~~ther~~ sources as I could, until I could no longer pay my ~~board~~ or maintain myself, when I was obliged to come to ~~my~~ father for support, with whom I have lived ever since."

This is the only evidence upon this subject, for although ~~he~~ two other witnesses have sworn to the same facts, yet I ~~cannot~~ avoid the conclusion that they know this only by hearsay, and not of their own personal knowledge. I regret ~~that~~ the counsel and master have both seen fit to disregard ~~the~~ directions of the 159th rule, to take down the testimony in such manner that it might appear whether the facts

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sworn to are within the personal knowledge of the witnesses or not. I am left to inference, but I am confident that my inference is correct. As the whole claim that she was deserted by the defendant depends upon these facts, the suit must fail, for it is a settled principle in causes of divorce never to grant a divorce where the only proof of the ground of divorce is the testimony of the complainant. *Woodworth v. Woodworth*, 6 C. E. Green 251; *Reid v. Reid*, *Ibid.* 33; *Cummins v. Cummins*, 2 McCarter 142.

But were the proof sufficient, and the facts sworn to by the complainant established by the oath of more witnesses, I am of opinion that they do not show a desertion of the complainant by the defendant. The fact is plain that she deserted him. She left him and went to her father, because he did not support her. [There is no rule that makes want of sufficient support by a husband, or total want of support, a desertion of his wife. It is no cause for divorce, and this court cannot, by construction, convert it into a ground of divorce by calling it desertion.] In most marriages, the husband at the time has no property, and in very many he is not able to maintain his wife at all without her aiding, to some extent, by her exertions. If he should become blind, paralyzed, insane, or in any way disabled in body, he would be unable to support his wife, and the marriage would be dissolved at her option; and where he is unable to furnish her support through incapacity for business, indolence, or intemperance, it has never been held in this state a cause for divorce, or sufficient to convert a desertion by a wife, or that account, into a willful and obstinate desertion by her husband. By marriage, a wife agrees to share the fortunes of her husband, in poverty and sickness, as well as in affluence and health. She may be obliged to aid in her own support and be bound to adhere to him. And she is not because he is poor and her lot uncomfortable, entitled to leave him and betake herself to the luxuries of the home of her father. Much less can this convert her unwarranted leaving her husband into a desertion by him. *Laing v. Laing*, 6 C. E. Green 248.

Dixon v. Dixon.

If a husband drives his wife from his house, or uses personal violence or brutal treatment towards her, such as to indicate an intention to drive her away, or to render it unsafe to live with him, the leaving his house for these reasons is a desertion by the husband, and if she be allowed to stay away for three years, without solicitation to return and proper assurances of better treatment, would be a desertion by him sufficient to warrant a divorce.

There may be cases, no doubt, where a willful and malicious refusal by a husband to permit a wife, who is discharging her own duties, to share with him such means of support as he may have, may be held to be an expulsion from his house and constitute a desertion. But the meagre disclosure of facts and circumstances in this case falls very far short of warranting such conclusion here.

The bill must be dismissed.

DIXON vs. DIXON and another.

1. Whether the amount of property settled by a husband upon his wife, in adjusting a suit for divorce, is greater than was reasonable, cannot be examined into, if he was of sufficient capacity to make the conveyance and to adjust the difficulties between himself and his wife.

2. When a suit for separation and maintenance is proper to be brought, neither that nor an avowed determination to persevere in it can be considered as a threat.

This matter was submitted to the Chancellor, upon bill, answer, replication, and proofs, without argument or brief.

THE CHANCELLOR.

The bill is filed by the complainant, John Dixon, against the defendant, Annie Dixon, and her trustee as co-defendant. The object of the suit is to set aside a deed executed by the complainant to the trustee, conveying to him one-half of his property, for the benefit of his wife. The chief part of the

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property was two houses and lots in Jersey City, worth about \$24,000. The grounds alleged for setting aside this conveyance are, that he was at the time in a state of incapacity to transact business by reason of his intoxication, arising from his excessive use of spirituous liquors; that he was induced to make such conveyance by the threats and solicitations of his wife and her trustee, who was her counsel in a suit brought a few weeks before against him for divorce *a mensa et thoro*, and for alimony; that the conveyance was of too large a proportion of his property, and was obtained by promises on part of his wife, that if he would make it, she would return to him, live with him, and take care of him, promises which she has refused to perform. The answer was given as required, without oath.

The defendant, Annie Dixon, is the second wife of the complainant; she is about thirty, and he about sixty years of age; he has four children of his first wife, all grown up, and none by his present wife. He is, and has been from some time before the death of his first wife, as appears by all the testimony, a confirmed habitual drunkard, often outrageous and violent, and at times subject to fits of delirium tremens, such that his first wife, his daughters, and, on one or two occasions, his present wife, were used to put laudanum in his beer or other drinks, to quiet his excitement on such occasions; he was found to be a habitual drunkard, by an inquisition issued, executed, returned and confirmed six months after the filing of his bill in this cause. But it appears, from the evidence, that he was frequently sober, and by no means for the greater part of the time subject to delirium tremens, or any derangement or mental disease arising from his habits. And such is usually, perhaps always, the case with persons in the habit of frequent and gross intoxication, and subject to fits of delirium tremens. His wife was compelled, by his conduct and treatment of her, to leave him, and from the evidence, clearly had sufficient cause to institute her suit for divorce from bed and board, and for alimony.

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acted with discretion and wisely, in adjusting that by settling upon his wife a proper proportion of his property. Whether the part conveyed to her is greater than reasonable, cannot be examined into here, if he was of full capacity to make the conveyance and to adjust the ties between himself and his wife. The amount is not decisive as, of itself, to be evidence of incapacity.

The only question is as to capacity, his capacity at the time when this arrangement was entered into and consummated.

There are three different occasions in this transaction at which his capacity, or his freedom from intoxication or delirium tremens, should be regarded. First, the time when he made the arrangement, after several negotiations with the counsel of his wife; next, the time when he signed the deed, some days after this; and lastly, the occasion, a few days later, when he met his wife at the office of her counsel, and the arrangement was assented to by both.

The evidence shows that on all three occasions he was free from delirium tremens, and in possession of his faculties. There is no evidence to contradict this. The fact on his part, that he was at other times, and frequently, intoxicated and wild with delirium tremens, is entirely consistent with this. And without regard to the burden upon whom, in a case like this, the burden lies to prove that complainant was, on these occasions, free from intoxication and delirium, the defendants have proved it affirmatively.

There is no proof that any threats were made to induce complainant to execute this deed; his wife, and her counsel both deny it. The suit for separation and maintenance was proper to be brought, and neither that, nor an express determination to persevere in it, can be considered material.

There is no proof of a promise to return and live with him in consideration of the deed.

The bill must be dismissed with costs.

CASES

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

OCTOBER TERM, 1871.

THE HACKENSACK IMPROVEMENT COMMISSION *vs.* THE NEW JERSEY MIDLAND RAILWAY COMPANY.

1. To entitle a party to a preliminary injunction his right in the subject matter in dispute, and to the remedy applied for, must be clear to the court, and free from reasonable or serious doubt, or established by proceedings at law.
 2. If the facts upon which the right depends are established or admitted, and the principles of law which, on those facts, would give the right, are settled and established in this state, it is not always necessary that the claim of the complainant should have been established in a suit at law. The Chancellor may, in such cases, apply the principles as settled by the courts of law to the facts, and allow the injunction.
 3. But when the principles of law on which the right rests are disputed, and will admit of doubt, a court of equity, although satisfied as to what is the correct conclusion of law upon the facts, may not, upon the opinion of the equity judge, without a decision of the courts at law establishing such principles, grant the injunction.
 4. An injunction will not issue, when the benefit secured by it is of little importance, while it will operate oppressively and to the great annoyance and injury of the defendant, unless the wrong complained of is wanton and unprovoked.
 5. The right of the complainants to an injunction depending upon the construction of conflicting provisions in a statute, and the construction of such provisions never having been settled by the courts of law, this court cannot interfere.
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Hackensack Improvement Commission v. New Jersey Midland R. Co.

On rule to show cause why an injunction should not issue against constructing a railroad, so as to obstruct Central avenue in Hackensack.

Mr. Douglas and *Mr. C. H. Voorhis*, in support of the rule.

Mr. Knapp, contra.

THE CHANCELLOR.

The defendants are a corporation, by virtue of an act approved March 17th, 1870, authorizing the consolidation of four railroad corporations, or any of them, under the name of the New Jersey Midland Railway Company. Three of these companies, the New Jersey Hudson and Delaware Railroad Company, the New Jersey Western Railroad Company, and the Sussex Valley Company, availed themselves of the provisions of the act, and became consolidated under the name prescribed. The consolidated company was, by the act, invested with all the powers and franchises, and subject to all the obligations of the companies that were consolidated. The Western Railroad Company were authorized to construct their road through the county of Bergen, and as no other of these three companies had that authority, the road in that county must be constructed under that charter. The complainants are a board, constituted by an act approved April 1st, 1868, and their powers enlarged by a supplement, approved March 31st, 1869, and another approved April 6th, 1871. By these acts they are authorized to grade, work, repair, and remove encroachments from all streets in the village of Hackensack, and to pass ordinances concerning the streets, and to raise, by taxes and assessment, all moneys required for these purposes. By the act of 1871, they now possess, exclusively, the power of altering, laying out, and vacating streets.

The defendants located their road through Hackensack, and filed the location in the office of the secretary of state,

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October 5th, 1870. There was, at that time, but two streets between the hill west of the village, known as the Red Hill, and State street, one of the old streets in the village. These two streets were known as First street and Second street; they are about three hundred and seventy-two feet apart, and are both crossed by the line of the road. Before filing the location, the defendants had fixed upon the grade of their road, and made contracts for the construction through the Red Hill, and between it and State street; and had agreed with the owners of the land there for its use, had taken possession, and begun the embankment upon it. The grade of the road, at First and Second streets, was about twenty-two feet above the surface of the ground, which, there, is a low wet meadow, and this embankment was to be made from the materials had from a deep cut, which the grade required to be made in the Red Hill. After this location, taking possession, arrangements with the owners, and making the contracts, and on the 18th of October, 1870, notice was given of an application for the appointment of surveyors, under the general road law, to lay out a road from State street to Prospect street, on the brow of the Red Hill. Surveyors were appointed, who, on the 19th of November, 1870, made a return, laying out a public road sixty-six feet wide, from State street to Prospect street. This new road, called Central avenue, intersects the route of the railroad of the defendants, at the west side of First street, and runs diagonally along and across it, to and beyond the west side of Second street, a distance of about four hundred and fifty feet. The defendants proceeded with their embankment, providing bridges at First and Second streets, but filling in the parts of Central avenue which were laid upon their located route, and making no bridge or tunnel for passing along that street. The complainants did not remonstrate or interfere with the work in progress until the filing of their bill, July 10th, 1871. They apply for an injunction to restrain the defendants from constructing their road across Central avenue, in such manner as will impede o

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obstruct the passage of horses, carriages, or cattle on or over that avenue, or, in effect, without constructing a bridge or tunnel under the embankment for such passage.

The power of this court to prevent injury and correct wrong before committed, by preliminary injunction issued at the commencement of a suit, and before the merits of the controversy are fully investigated, is one of its peculiar and most useful functions. But, like all extraordinary powers, if abused, or exercised without great caution, it may be productive of incalculable evils. On this account it is never exercised but under certain conditions.

✓ In the first place, the right of the complainants in the subject matter in dispute, and to the remedy applied for, must be clear to the court, and free from reasonable or serious doubts, or established by proceedings at law. If the facts upon which the right depends are established or admitted, and the principles of law which, on those facts, would give the right, are settled and established in this state, it is not always necessary that the claim of the complainant should have been established in a suit at law. The Chancellor, in such case, may apply the principles as settled by the courts of law, to the facts, and allow the injunction. But when the principles of law on which the right rests are disputed, and will admit of doubt, a court of equity, although satisfied as to what is the correct conclusion of law upon the facts, may not, upon the opinion of the equity judge, without a decision of the courts at law establishing such principles, grant the injunction. This doctrine was fully declared and established by the Court of Appeals of this state, in the case of *The Morris and Essex Railroad Company v. Prudden*, 5 C. E. Green 530. Another principle, also recognized in that case, is, that an injunction must not issue when the benefit secured by it to one party is of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is wanton and unprovoked.

The defendants are constructing their road under a charter

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granted by the legislature, and claim that this charter gives them the right to cross any public road not in use when it was granted, or at least when the road was laid out, without providing a bridge or passage over or under it. This right depends upon the construction of an act approved March 16th, 1870, being a supplement to the charter of the New Jersey Western Railroad Company. This is the act from which that company derived the power to extend their road across Bergen and Hudson counties, to the Hudson river, and to construct it at the place in question. The first section gives them "the power to acquire, hold, use, and possess all lands, rights, and property required for such extension, in the manner provided in the act of incorporation; subject, however, to the same rights, privileges, and provisions, in the use and enjoyment of the same, as contained in that act." The second section declares that they shall be invested with all the rights, powers, privileges, and franchises theretofore granted to the Hackensack and New York Railroad Company, by their act of incorporation, in respect to the location, laying out, and construction of the extension. This supplement thus clearly grants all the powers and privileges of both companies in constructing the extension.

The tenth section of the charter of the Western Company required them to construct and maintain bridges or passages across their road when any road "now or hereafter laid out shall cross the same." The tenth section of the charter of the Hackensack and New York Company, approved in 1856, required such bridges or passages "where any road *now in use* shall cross the same." The right and privilege granted by one section was to build a road with passages at every road "then or thereafter laid out;" by the other, to build one with passages at every road "then in use." The franchise, as granted by the second section, is more valuable and extensive than that granted in the first, and the franchise and other powers and privileges are expressly granted as to the laying out and construction of the road. On the other hand, the first section makes the grant subject to the

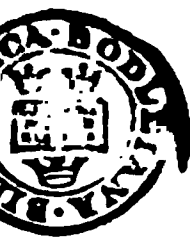
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same provisions, in the construction, use, and enjoyment of the same, as are contained in the Western Company's charter. There is a discrepancy in these two sections; and notwithstanding the rule, that in grants like this the construction must be in favor of the public and against the grantee, I should hold that where two sections of the same charter granted the same powers, but one to a greater extent than the other, the construction must be that the largest power is given. But in this case the grant of the power to extend the road is expressly given, subject "to the provisions" of the Western Company's charter; and one of these provisions is a passage to be provided for every road, whenever laid out. Yet the narrow construction will deprive the first clause of the second section of all effect, contrary to a settled rule of construction. That clause was intended for some purpose, and if it is restrained to the purposes declared in the first section, or to the rights, powers, privileges, and provisions of the original charter, it has no effect.

The construction of this act, or of any statute with similar discordant provisions, has never been settled by the courts of law, and it much depends upon which of the many and various rules for the construction of statutes the court of law that shall settle the construction may apply. To me, whatever may be my own view, it is doubtful what construction will be given by the law courts. The right of the complainants to have a passage at this crossing is not settled or clear, and as the injunction depends on this right, it must be refused.

Further: the injury to the complainants is neither great nor irreparable. The avenue has never been opened or used for public travel. The consequence of refusing the injunction will be, that the defendants may go on to complete and continue their embankment until the right shall be tried and determined at law. If that is against the defendants, they will be compelled to remove the embankment, or provide a passage through it; and the injury cannot be great that will

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occur in the mean time, by the want of the use of an avenue, just laid out over a low, wet meadow, not yet graded or fit for travel, and which will probably take months to prepare it for use. In Prudden's case, the court held that "it must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call upon a court of equity."

But again: under the rule laid down in that case, the fact that the benefit secured to the complainants is of little importance, while the injunction will operate oppressively, and to the great annoyance of the defendants, must prevent the granting of this injunction at this stage of the cause. The injury to the complainants or the public, by refusing it, as above stated, will be small. The defendants, on the other hand, will be seriously delayed in the completion of an important public work, or be compelled to build a bridge, in the shape of a tunnel, several hundred feet long, intersecting a bridge, which they have erected and are bound to maintain, over Second street; and which cannot be constructed without an outlay equal to the cost of grading nine miles of the road. They would have to remove the earth dumped on the embankment before the filing of the bill, at a cost of \$2000. A diagonal crossing, by a public road, in the manner in which this road has been laid across or along the defendants' railroad, at an embankment as high as this, is, I think, unprecedented in engineering. If the bridging required is at all practicable, it would be at an expense which would not be warranted in the construction of any road in that section of the country.

I do not think that the defendants are deprived of the benefit of the rule, by the wrong being wanton and unprovoked. It was not wanton. They made their embankment, in this place, under an honest, even if mistaken, construction of their corporate privileges.

The complainants can, with small expense and little inconvenience to the public, remedy the obstruction complained of. They can vacate and lay out streets. By

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changing the course of Central avenue, where it meets the defendants' embankment on the north side, so as to run along the north side of that embankment, for three hundred feet, to Second street, vehicles could pass under the bridge at Second street into the avenue, with an increase of distance of less than fifty feet. If the complainants are, at law, entitled to the legal rights claimed by them, they are not bound to do this. But when the injury of which they complain, can be obviated by themselves at so little cost and inconvenience, this court will not, on account of it, issue an injunction to restrain the progress of an important public work.

In Prudden's case, the railroad was laid in Dickerson street, upon which was the front of Prudden's wheelwright shop and his dwelling-house; and the injury complained of was, that the rails so obstructed access to the front of his premises, that wagons could not conveniently stand there to load or unload. But Morris street, a cross street leading from Dickerson street to the north, ran along side his premises, and gave him access to the side of his lot, and thus, through the rear of the lot, to the back side of his house and shop; and as it did not appear that the exigencies of his business imperatively required the use of the street in front, or of the front of his house or shop, the court held that the injunction should not have issued. In this case, the expense and inconvenience of changing Central avenue for a few feet, as suggested above, would not be as great, comparatively, as to Prudden, in opening access through his back yard, and the rear of his shop, to make good the want of access to the front.

These views make it unnecessary to consider the points raised, that the complainants are not a body corporate, and cannot maintain a suit in their own name; and that by allowing the defendants to go on with their work, without interference or remonstrance, for more than six months, and to expend a large amount of money in the work, they have lost the right to be protected by a court of equity.

Johns v. Norris.

I am of opinion that this court cannot interfere by injunction, or in any other way, between these parties, until the right claimed by the complainants is established at law.

JOHNS and others vs. NORRIS and others.

1. An agreement with a defendant in execution to purchase the property for him at the sheriff's sale will not create a trust in his favor unless in writing, or fraudulently used to obtain the property at an inadequate price.

2. If an answer denies making an agreement stated in the bill, it is not necessary to plead the statute of frauds; the complainant must prove a valid agreement, which, in all cases within the statute, must be in writing.

3. As against a purchaser who holds a legal title, good on its face, by conveyance from one who is charged with fraud in acquiring it, it is necessary that the complainant should prove notice of the facts constituting the fraud.

4. Unreasonable delay in bringing suit for the specific performance of a contract to convey, will be a defence to the relief, especially where the other party has made improvements in the mean time, or the property has greatly increased in value.

5. A party cannot be charged with bad faith in making a contract to convey property bought at sheriff's sale upon such contract, if, after a delay of five years without any offer to perform by the person to whom he agreed to convey, and who should have been the actor, he makes an offer to fulfill, which is declined, and waits two years longer before he disposes of the subject of the contract.

6. An administrator is not a trustee of the real estate of his intestate for the heir, and as against the heir he may purchase for himself the real estate of the intestate at a judicial sale on foreclosure of a mortgage. He is not entitled to receive the surplus of the proceeds of the sale for the heir-at-law: it must be paid directly to the heir.

7. A purchase of the real estate of an intestate at a foreclosure sale by one who, by contrivance or fraud, had prevented a sale for a fair value, will be set aside as against the heir. But this relief will not be granted against a subsequent bona fide purchaser for a valuable consideration, without notice of the contrivance or fraud.

8. A widow who procures a person to purchase at a foreclosure sale the real estate of her late husband at prices far below its real value, by the con-

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trivance agreed upon to deter bidders, by giving out that the purchase is for the benefit of the widow and her family, is a party to the fraud against the heir and creditors, and does not come into court with clean hands to compel the confederate to convey to her.

This cause was argued upon final hearing, upon bill, answers, and proofs.

Mr. W. B. Williams, for complainants.

Mr. Ransom, for defendants.

THE CHANCELLOR.

The complainants are Theresa Johns and Anna Maria Morehouse, the first the daughter and only heir, the other the widow of Thomas W. Morehouse, who died September 27th, 1855, intestate. Administration of his personal estate was granted to his widow, September 29th, 1855. Morehouse, before and until his death, carried on the business of a tinman at his premises in Greene street, in Jersey City; his widow, after the grant of administration, continued the business in her own name, using the assets of the estate, collecting a large amount of the credits, and paying few of the debts of the intestate. Upon application of her surety the grant of administration to her was revoked by the Hudson County Orphans Court, February 17th, 1857, and on the 25th of that month, letters *de bonis non* were granted to the defendant, Noah Norris, who, at her request, accepted them. The intestate died seized of three parcels of real estate in Jersey City, known as the York street, the Greene street, and the Grove street property, each largely mortgaged. Noah Norris had sold to him the York street property, and held a mortgage for \$2000, part of the consideration, and on the 20th of February, 1857, he assigned to his brother, the defendant, John D. Norris, for full value. The Greene street property was subject to a mortgage held by Mary Bolen, the mother of the intestate, and the Grove street property to a mortgage for \$2250. All three mort-

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gages were for part of the purchase money, and no interest had been paid on either since the intestate's death. The mortgages were all foreclosed by the holders, and the premises sold at foreclosure sales by the sheriff. At these sales John D. Norris bought the York street property, January 7th, 1858, for \$1000. Noah Norris bought the Green street property for \$1325, November 19th, 1857, and the Grove street property, January 7th, 1858, for \$2550. The only surplus on these sales above the mortgage debts was \$65.98, on the Grove street sale; this was received and administered by Noah Norris, as administrator. Noah collected the remaining personal assets, and with them paid to the creditors of the intestate a dividend of twelve per cent. The residue of their claims, to the amount of several thousand dollars, are unpaid. The complainant, Therese Johns, was, at her father's death, an infant ten years of age and of course an infant at these sales by the sheriff. She has since intermarried with Hiram C. Johns, who is joined with her in the suit as complainant.

The bill charges that these foreclosure sales were had to the advice and contrivance of Noah Norris, who was a confidential friend and business adviser of the widow. That he advised her not to pay the interest on these mortgages so that they would be foreclosed. That at the foreclosure sales he would buy in for her, and keep off other bidders by letting it be known that he was bidding for her; that he would advance the money and hold the property as a mortgagee, and that she could pay him the interest and redeem the property. It charges that the assignment of the mortgage held by Noah Norris to John D. Norris, was not bona fide, but a sham. That at all three sales, Noah Norris gave out to her and to persons present, that he was bidding for her and so deterred bidders, and by these means purchased the property at prices much below its value; that he bid off the York street property and transferred the bid to John D. Norris. That after the sale he repeatedly promised her to let her redeem the property whenever she should

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able, and acknowledged that he held it for her. And that in 1862 and 1863, he rendered her accounts of his advances and interest on them, in the last one calculated at compound interest, showing the amounts at which he was to convey the property to her. That in 1865 he conveyed the Grove street property to John D. Norris, and the Greene street property to his son, the defendant, Brainard T. Norris; that these transfers were not bona fide, but fraudulent and without consideration.

It charges that Noah Norris, being administrator, could not purchase the lands of his intestate at a foreclosure sale for his own benefit, but that such purchase must be in trust for the estate; and that the two other defendants knew of these equities at the transfers by him to them. The bill prays that the purchase of Noah may be declared to have been in trust for the complainants, and that the defendants may be compelled to re-convey to them upon their repaying to Noah all moneys paid by him in the purchase.

The answers of the defendants under oath deny, positively, all the charges of the bill by which the defendants, or either of them, are sought to be affected with a trust, or with fraud, except the fact that Noah Norris was administrator of Morehouse. They deny, fully, that Noah Norris contrived or instigated these foreclosures, or promised in any way to purchase and hold for the widow, or that he gave out to persons who might have bid, that he was buying for the widow, or that he promised afterward to hold the same for her to redeem at her pleasure. The two other defendants deny that, at the conveyance to them, they had any knowledge or notice of these alleged facts, or that the conveyances to them were without consideration, and not in good faith. These denials are full and responsive.

Much evidence has been taken on both sides; on many points it is very contradictory. Much of this may be charged to inaccuracy of recollection of events that occurred ten years before, and to a warm imagination which makes narrations, often repeated by a good friend, seem as if they

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were of facts seen by the witness. But after all these allowances, there must be in these contradictions bad faith. An notwithstanding the responsive answer of Noah Norris, and his positive testimony to the contrary, the weight of the evidence of more than two witnesses, compels me to believe that, at the sales of the Greene street and York street properties at least, he promised that he would buy them for the benefit of the widow, and that it was given out by him, and with his knowledge and connivance, to persons there, and who would have been at those sales, that he intended to buy for the widow.

I have further from the testimony arrived at these conclusions:

That Norris permitted the widow to occupy the Greene street property, after the sale, without rent; the only rent he exacted, was as administrator for her occupation before the sale. That in 1862 and 1863, he made out accounts, at her request, of the amounts that would be due to him on the conveyance, according to the right claimed by her, charging interest, and in the last account, compound interest. That these accounts included the York street property, which he assumed he could induce his brother to convey.

That at this time he was willing, and offered to convey and procure his brother to convey, on these terms; and that he actually made out and submitted to Mrs. Morehouse, for her consideration, an unexecuted deed for the Grove street property, to a married woman in New York, a relative of Mrs. Morehouse, named for that purpose by her. That that and the whole proposition to convey, was then rejected by Mrs. Morehouse, if not positively, at least by not accepting either. That her reasons for this were these: First, That the financial condition of the country, in 1862 and 1863, had not recovered from the severe depression, at the time of the sheriff's sales in the winter of 1857-8, consequent upon the failure of the Ohio Life and Trust, in the summer of 1857, and the numerous large failures which followed as its consequence. That it was still doubtful if those prices, w.

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interest, taxes, and expenses, did not approach so nearly to the value of these lots, as to make them a doubtful purchase. The second reason was, that Mrs Morehouse was involved in liabilities arising out of her administration, and did not want to hold any property in her own name, for fear of such liabilities. She had at this time about \$2400, collected from her husband's business, or her continuation of it, and which, in good faith, should have been applied to his debts. She preferred not to invest this in redeeming his property in her own name. She told Noah Norris the conclusion to which she had arrived, if not her reasons for it; and after taking his advice as to purchase of a house with it, bought one in York street, in her daughter's name, for \$3000, of which her daughter furnished \$600. That after this, Mrs. Morehouse did not tender or offer to pay Noah the amount due him on her theory, or ask for a re-conveyance of the property, until after his conveyances to the other two defendants, or, in fact, until the commencement of this suit.

That the assignment of the mortgage on the York street lot, was in good faith and for a valuable consideration. That the lot was bid off, at the sheriff's sale, by John D. Norris, for his own benefit, and in good faith to save his debt. That John D. Norris purchased the Greene street property, and Brainard T. Norris the Grove street property, for valuable considerations actually paid, and without any notice or knowledge at the times of such purchases, respectively, that Noah Norris had agreed to buy these lots for the widow, or that he caused or permitted to be given out to any one that he intended to purchase for the widow, or that he did any act that is charged as a fraud upon that sale, except that they knew that he was then the administrator of Morehouse. The conclusions stated in this paragraph, are arrived at from the positive denials in the answer, and the utter want of any testimony to contradict these denials. And there is no evidence from which such notice can be inferred. There are circumstances surrounding each case that warrant suspicion, and that would give great support to

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any positive testimony that these purchases were not in good faith and without notice. The fact that Brainard made out the account, in 1862 and 1863, for Mrs. Morehouse, is perfectly consistent with the extent of knowledge, admitted by him; that is, that his father had offered, or was willing, that Mrs. Morehouse might take all her husband's property, upon indemnifying him. The statement of these two defendants is neither impossible nor incredible; nor are they so improbable as to cause hesitation in believing them. As there is no other evidence they must prevail.

The purchase of the York street lot by John D. Norris, if we take his uncontradicted answer or evidence, is free from every thing that would amount to a fraud or constitute a trust. He never promised, directly or indirectly, to buy for the widow, and used no means to discourage bidders. And the amount due on his mortgage was, probably, more than any one would have bid at a cash sale of this property, in the financial situation of the country at that time.

The questions as to the other two parcels, so far as Noah is concerned, depend upon the contract with Mrs. Morehouse, to purchase for her; the fraud of Norris at the sale; and his duty, as administrator, to protect the heir and creditors.

As to the contract, it is not in writing, and is void by the statute of frauds. In the case of *Merritt v. Brown*, 6 C. E. Green 401, Chief Justice Beasley, in delivering the opinion of the court, says: "When, therefore, the elements of the case are simply a purchase, under a parol promise to hold for the benefit of the defendant in execution, I think such an arrangement, the statute of frauds being set up as a defence cannot be enforced either at law or in equity." The opinion subsequently holds, that if the contract, or any other contrivance, is used by the purchaser to obtain the property in execution for an inadequate price, the title to equitable relief is clear; but that even in this class of cases, the purchaser should be protected against all pretences of a trust by parol, unless his mala fides be proved by the clearest and

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most direct evidence. In that case the agreement was admitted in the answer, and the statute of frauds not set up in the defence, and, therefore, could not protect the defendant. But in this case the agreement is fully denied in the answers; and then the rule in equity is, that the statute of frauds can be relied on. The complainant is then bound to prove a legal agreement, which, in cases like this, must be in writing. *Browne on Stat. of Frauds*, § 511; *Ontario Bank v. Root*, 3 Paige 478; *Cozine v. Graham*, 2 Paige 181.

No relief then can be had upon this agreement. In the same case the Court of Appeals held, in accordance with the opinion of the Chancellor, that the complainant had lost his title to relief, by his laches or delay in bringing suit. In that case, the complainant made no offer to fulfill in two years; in the mean time the value of the property had increased, and the defendant had, with the complainant's knowledge, put improvements upon it. Here, the delay was for ten years, and the increase in value and the improvements are both much greater. This delay must bar all remedy on the contract. Nor is any mala fides, in regard to this contract, proved by clear evidence, or proved at all. On the contrary, the weight of evidence is, that it was both made in good faith and so offered to be fulfilled. A party to a contract who, after a delay of five years, without any offer to fulfill by the other party, that should have been the actor, makes an offer on his part to fulfill, which is declined, and who, after waiting two years longer, sells the subject of the contract, can hardly be charged with bad faith in making it; and this is the only bad faith that can entitle to relief in equity on a parol contract.

The fraud in the sale, if any, was as to the heir of Morehouse, Theresa Johns, or rather as to his creditors, for, evidently, nothing would have been left to her by a fair sale. It consisted in deterring purchasers, by declaring that the property was bought for the widow, who, by this means, would have acquired the title for an inadequate price, to the injury of the creditors and the heir. If this was a fraud, the

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widow was a party to it, and the party who was to receive the whole benefit. She cannot come into equity for relief against her confederate. In this affair her hands are not clean. The complainant, Theresa, if this was a fraud unconnected with the contract, might be entitled to relief against it. She is the heir, and has not participated in any of these transactions, much less in any fraud. But she is entitled to no relief founded on this agreement; it was not with her or for her.

But as against her, the two defendants, John D. Norris and Brainard T. Norris, must be regarded as bona fide purchasers without notice. There was no pretence, on part of the complainants, that either of them had any notice or intimation of the contrivance to deter bidders, which was the only fraud against the heir or the creditors. If Brainard had been told by his father, when directed to make out the accounts, that he had bought the property at sheriff's sale, under this agreement with Mrs. Morehouse, it would have been no notice of this contrivance in which the fraud consists; and Theresa has no claim under the agreement.

It is claimed that Noah Norris, as administrator, was trustee for the heir and creditors, and, therefore, had no right to purchase any of the estate for himself, and that the other defendants had notice of this fact.

Noah Norris, as administrator, was a trustee of the personal estate for the creditors and next of kin. He had no power over the real estate, nor trust as to it. He could only meddle with that by an order of the Orphans Court that he should sell it. Such order was never made. Either he or the creditors could have applied for it. It was no his duty more than it was theirs. But if it was his duty, it was a duty only to the creditors, not to the heir. His power in this was controlled by the mortgagees and the foreclosure suits, one of which was commenced before the grant of administration to him. He, as administrator, had no right to the surplus on these sales, except to pay debts; and even for that purpose it was doubtful, until the act of

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March 31st, 1869, whether he could have obtained the surplus of a sale made more than a year after Morehouse's death. Theresa could have obtained it, if not needed by the creditors. He could not have prevented her. It was not only not his duty to apply for her, but he could not have applied for her unless specially authorized by her. Under the law, as it now stands, the administrator can only get so much of such surplus as is needed for the payment of debts; the residue will be ordered to be paid to the heir, not through the administrator, but directly. Norris was in no sense a trustee for Theresa as to her father's real estate. And she can have no remedy as against him, or his vendees, founded on such supposed trust.

There is no need to determine that he was such trustee as to creditors, until a suit shall be brought by them.

The bill must be dismissed.

THOMPSON vs. THE GERMAN VALLEY RAILROAD COMPANY.

1. Every person, whatever his office or dignity, is bound to appear and testify in courts of justice when required to do so by proper process, unless he has a lawful excuse. The dignity of the office, or the mere fact of official position, is not of itself an excuse; and whether the official engagements are sufficient, must be determined by the circumstances of each case.

2. The Governor will not be compelled to produce in court any paper or document in his possession; he will be allowed to withhold it, or any part of it, if, in his opinion, his official duty requires him to do so.

3. The Governor cannot be examined as to his reasons for not signing an act of the legislature, nor as to his action in any respect regarding it. But he is bound to appear and testify as to the time an act was delivered to him.

4. An order to testify is an unusual practice, and ought not to be made against the Executive of the state.

5. In the case of the Executive, the court would hardly entertain proceedings to compel him to testify by adjudging him in contempt. It will be presumed that the Chief Magistrate intends no contempt.

6. If the Governor, without sufficient or lawful reason, refuses to appear and testify, he is, like all other citizens, liable to respond in damages to any party injured by his refusal.

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In this case, a subpoena *duces tecum* had been served upon his Excellency the Governor, commanding him, by his individual name, to appear and testify before an examiner of this court, and to bring with him an engrossed copy of a private statute which had passed both houses of the legislature on the 30th of March, 1871, and been sent to him, as Governor, for his approval. The Governor declined to obey this subpoena, and sent to this court a letter now on file stating that he did not decline out of any disrespect to the court or to the law, but because he thought his duty required of him not to appear or to produce the paper required or to submit his official acts, as Governor, to the scrutiny of any court. An order was granted that the Governor should show cause why he should not appear and testify, and produce the copy of the act.

On the hearing of the rule, Cortlandt Parker, esquire appeared as counsel to show cause against the rule, and read and placed on file a letter of the Governor, directing him to appear and show cause against the rule. In this the Governor stated that he had placed the engrossed bill in the state library, in the custody of the librarian, with directions that no one should be permitted to have access to it except upon his order or that of the Chancellor. He stated that by his official register, the bill appears to have been presented to him on the 4th of April, the legislature adjourning on the 6th, at noon. That the promoters of the act contend that it was presented to him on the evening of the 30th of March, but that if this was true, yet as the legislature was not in session on Saturday, the 1st of April and it has been the custom of the Executive not to regard any day in which the legislature was not in session as part of the five days in which he is required to return a bill, and as parts of days are not counted, he was of opinion that he had the power to prevent this bill from being a law by retaining it. That he disapproved of the bill, and retained it with the intention of preventing it from becoming a law. That as, in his opinion, it did not become a law, he was no

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required to deposit it in the office of the Secretary of State, and did not so deposit it.

Mr. R. S. Green, in support of the rule.

Mr. C. Parker, contra.

THE CHANCELLOR.

The subpoena was directed to the Governor, by his individual name, and not as Governor. Every person, whatever his office or dignity, is bound to appear and testify in courts of justice when required to do so by proper process, unless he has a lawful excuse. The official engagements and duties of the higher officers of government may be, and in many cases are, a sufficient excuse. The dignity of the office, or the mere fact of official position, is not of itself an excuse, and whether the official engagements are sufficient, must be determined from the circumstances of each case. Whether the highest officer in the government or state will be compelled to produce in court any paper or document in his possession, is a different question. And the rule adopted in such cases is, that he will be allowed to withhold any paper or document in his possession, or any part of it, if, in his opinion, his official duty requires him to do so. These were the rules adopted by Chief Justice Marshall in the trial of Aaron Burr. He allowed a subpoena *duces tecum* to President Jefferson and held that he was bound to appear, but that he should be allowed to keep back any document, or part of a document, which he thought ought not to be produced. 1 *Burr's Trial* 182; 2 *Ibid.* 535-6.

The same view was taken by Chief Justice Tilghman in *Gray v. Pentland*, 2 *Serg. & Rawle* 23. His seeming approval of the action of the Court of Common Pleas, in refusing a subpoena *duces tecum* to the Governor, was based upon the right of the Governor to withhold the document at his discretion.

The Governor having placed this paper where it can be

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examined and produced in evidence before the examiner, upon the order of this court, there is no further question as to the production of the paper. An order for its production has been made. The production of the document can be of injury to no one; it is a private act, passed by both houses, and its contents, and the fact of its passage, are known. Whether this act is a law, and what are its contents, are, or may be material in the pending suit. From the facts stated and alleged, it may be a grave question whether or not this act became a law. The time when it was delivered to the Governor, may be a very material fact in determining that question. That is a proper question for the courts to determine. They may arrive at a conclusion different from that of the Governor; and if they do, it will be their duty to decide according to their own views, as the Governor, in his action, must be governed exclusively by his views. The Governor cannot be examined as to his reasons for not signing the bill, nor as to his action in any respect regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him; that is a bare fact, that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify.

But I will make no order on him for that purpose. The subpoena was rightly issued, without the order of the court. These writs, like all other process to appear, are issued to the clerk, upon application of the party or his solicitor. Such is the settled practice. An order to testify is an unusual, if not unheard of, practice. Such order ought not to be made against the Executive of the state, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply, even if directed by an order. And in his case, the court would hardly entertain proceedings to compel him, by adjudging him in contempt. It will be presumed that the Chief Magistrate

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intends no contempt, but that his action is in accordance with his views of his official duty. And in the present case that presumption amounts to a certainty. Chief Justice Marshall on the trial of Burr, vol. 2, p. 536, remarks: "In no case of this kind would a court be required to proceed against the President, as an ordinary individual. The objections to such course are so strong and so obvious that all must acknowledge them."

If the Governor, without sufficient or lawful reasons, refuses to appear and testify, he is, like all other citizens, liable to respond in damages to any party injured by his refusal.

It is possible that there may be cases where courts, from the conduct of an Executive, might deem it proper to proceed against him for contempt. But this is not one of them, and the party here must be left to his civil remedy.

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1. In the absence of any evidence to show the effect in the courts of another state, of a judgment or decree obtained in that state, this court must give such effect to the judgment as is indicated by the plain meaning of its words, and as would be given by the rules of law in this state to a like judgment of its own courts.

2. The reversal of a judgment generally, for a specified error alleged to be the only error, is a reversal of the whole judgment, and not only of the part held to be erroneous.

3. The liability of a defendant as the representative of a party dying *pendente lite*, like any other fact upon which a decree is founded, must appear by the record, and not by proof only.

4. Courts of equity will decree the performance of contracts relating to lands without their jurisdiction. But in such cases, the decree cannot affect the land, but can only be enforced when the court has jurisdiction of the person of the defendant, and thus compel him to execute the conveyance. In such case it is the conveyance, not the decree, that has effect.

5. A judgment by a court of another state that a deed given for lands in this state is void, is a judgment as to the title of lands here, which that

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court has no jurisdiction to make. And it has no jurisdiction to decree a conveyance or delivery of possession founded on that decree. This rule is not varied by the Federal Constitution, or the act of Congress, declaring that the records and judicial proceedings of the courts of any state shall have such faith and credit given to them in the courts of another state, as they had by law or usage in the courts of the state whence they were taken.

6. This court will not enforce a judgment of the courts of another state obtained by fraud. And in a court of equity it can make no difference whether the fraud is set up in defence, or is in support of a suit to restrain further proceedings on the judgment. It will not inquire into or examine the merits of such judgment; but when the case shown by the record is such that no court could, upon any principles of law, have given the judgment unless imposed upon, this will be regarded and taken as proof that the judgment was obtained by fraud on the court.

7. A court of equity will not entertain a suit for a specific sum of money, recovered by the judgment of a court in another state.

This cause was argued on final hearing, upon bill, answer, replication, and proofs.

Mr. Vanatta, for complainant.

Mr. McCarter, for defendants.

THE CHANCELLOR.

The complainant is Elizabeth Davis, the universal legatee and devisee of Joseph H. Davis, deceased, and administratrix with his will annexed. The suit was brought against Samuel F. Headley, to enforce a decree obtained by J. H. Davis against him in the courts of Kentucky; his wife, the defendant, Maria J. Headley, was joined, because of her inchoate right of dower in lands in this state, supposed to be affected by the decree.

S. F. Headley answered alone, without his wife. After issue, while the testimony was being taken, he died, and by an order made in the cause, reciting that, by his will, his son, J. B. Headley, was appointed an executor thereof, with the defendant, Maria J. Headley, the said J. B. Headley, executor of the will, and Elizabeth Bently, a daughter, heir and devisee of the testator, with her husband, were directed

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to be made defendants in place of the testator. The order directed that a copy be served on them within thirty days from its date, and that they should answer in thirty days from the service. Those substituted defendants did not appear, nor did the complainant file any appearance for them.

J. Boyd Headley afterwards died, and no one was made defendant in his stead.

The judgment sought to be enforced is a judgment or decree of the Circuit Court of Lawrence county, Kentucky, on a petition in equity. That court has jurisdiction both of matters of law and of matters of equity. A decree was made by it in that suit, in which J. H. Davis was plaintiff, and S. F. Headley, defendant, in October, 1859, by which it was decreed, among other things, that the conveyance by Davis to Headley, of certain property in Morristown, in this state, be rescinded, set aside, and held for nought, and that Headley should restore to Davis the possession thereof, and that Headley should be forever restrained from setting up that conveyance in any suit touching that property. It was also adjudged that Davis should recover from Headley \$500 with interest from December 12th, 1857, until paid, and his costs of that suit.

From this judgment Headley appealed, upon its being rendered. The Court of Appeals of Kentucky has jurisdiction of such appeals, and is the court of the last resort. In it the appeal remained until January Term, 1862. At that term the court determined the appeal, upon whose motions not shown by the record or any evidence in the cause. It adjudged that the decree for \$500 was erroneous, that it should have been for \$213.50. The record then states:

"We perceive no other error in the judgment, but for the error above mentioned, and on that ground alone, the judgment is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion."

Upon this judgment being remitted to the Circuit Court, judgment was entered thereon in that court as follows:

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"The opinion of the Court of Appeals having been filed herein, it is now ordered and adjudged, in obedience to the directions of the opinion, that the plaintiff, Davis, recover of the defendant, Headley, the sum of \$213.50, with interest thereon at the rate of six per centum per annum, from the 12th day of December, 1857, and the costs accruing since the return of the case from the Court of Appeals; and the defendant is forever barred and enjoined from enforcing the payment of any part of the \$500 agreed by the plaintiff to be paid for one-sixth of the stock or interest of the unorganized corporation, for which a charter was granted by the legislature of Kentucky. The parties are hence dismissed."

These are the judgments as contained in the record certified according to the act of Congress, and as set out in the bill. No evidence has been offered as to the effect of these judgments in the courts of Kentucky, except that it is shown that these are courts of record, and that their judgments cannot be impeached collaterally. But upon the question whether, in Kentucky, this reversal would be regarded as it imports to be upon its face, a reversal of the whole judgment below, nothing is shown.

This court must, therefore, give such effect to this judgment as is indicated by the plain meaning of its words, and as would be given to it by the rules of law in this state. The Court of Appeals find one error in the judgment; that error is specified, and then its judgment plainly and directly is, that on that ground, and that alone, the judgment of the Circuit Court is reversed, and the cause is remanded. The appeal is from the whole judgment below, not from any part of it, and the reversal is of the whole. The Kentucky civil code, then in force, provides, Title XII, § 575, "That a judgment or final order may be reversed or modified by the Court of Appeals, for errors appearing in the record."

The court then could, and perhaps ought to, have modified the judgment of the Circuit Court. But it was not done the judgment below was simply reversed, and the record remanded, with the declaration that there was but one error

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in it. It was remanded for further proceedings in the court below. That court could, thereupon, have given judgment for the rescission of the contract, and restoring the Morristown property, and the other relief given by its first judgment, reducing the amount of money recovered. This would seem to be the correct practice. But this was not done, the judgment was entered for the money alone. Every other part of the original judgment remains reversed. It seems to me that this is the only effect that would be given to this judgment in Kentucky. An examination of the state code of practice in civil cases, adopted in 1852, and all the supplements to it, though not offered in evidence, has not changed this conclusion. As there is no judgment in force relating to the Morristown property, the relief must be refused, so far as that is concerned.

No decree can be given for the recovery of the amount of money for which the judgment was eventually rendered in Kentucky, because there is no personal representative of Headley before the court, against whom such relief could be prayed for. Mrs. Headley may have been appointed executor of his will, with J. Boyd Headley, deceased. But it does not appear in the record or proceedings, that letters testamentary were granted to her, or that she ever acted as such. Her liability, like any other fact on which a decree is founded, must appear by the record, not by proof only. A recovery can only be had *secundum allegata et probata*. She was, individually, a party to the suit, so far as her right of dower was concerned; but the right to recover, on this judgment, does not survive as against her, and she has never been made a party, as executrix, so that she could have an opportunity to plead no assets, or any other defence peculiar to an executor.

Besides these, there are other fatal obstacles to a recovery in this suit, even had the original decree in the Circuit Court remained without appeal, or been modified and affirmed on appeal, or been entered anew in the Circuit Court as modified by the Court of Appeals.

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In the first place, the real property at Morristown, one of the principal subjects of the decree, being in this state, was not within the jurisdiction of the courts of Kentucky; they could make no decree that would affect, or in any way change, the title to it. It is a well settled principle of law in the decisions in England and this country, and acquiesced in by the jurists of all civilized nations, (and thus part of the *jus gentium*,) that immovable property, known to the common law as real estate, is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it. *Story's Confl. of Laws*, § 591. I find no case in which a statute, judgment, or proceeding in one country, has been held to affect such property when situate in another country, or beyond the jurisdiction of the sovereign or court making the statute or decree.

Courts of equity in England and America, by a long series of decisions from that of Lord Hardwicke in the case *Penn v. Lord Baltimore*, 1 *Ves.* 444, to this time, have decreed the performance of contracts relating to lands without their jurisdiction. But in these cases it is admitted, it was by Lord Hardwicke, that these decrees could not affect the land, but could only be enforced when the court had jurisdiction of the person of the defendant, and thus compelled him actually to execute the conveyance. In such cases it is the conveyance, not the decree, that has effect. These decisions will be found collected in the notes, in the English and American editions, to *Penn v. Lord Baltimore*, in 3 *Leading Cases in Equity* 787.

A recovery in the courts of Kentucky in a real action for the title of lands in New Jersey, or in an ejectment for the possession, would be a perfect nullity; no action could be brought upon it here to obtain execution of it. It would be simply void. A decree to deliver possession of lands in New Jersey might be enforced by the courts of Kentucky; if the person of the defendant he could be imprisoned, or even subjected to *peine fort et dure* until

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actually delivered it. But such judgment would not be enforced by the courts of this state; it would be giving the jurisdiction, as to the right to real estate, to the courts of Kentucky, and leave to the courts of this state only the ministerial duty of executing these decrees. And the title to real estate in New Jersey could be tried in any state in which the owner chanced to travel, if suit was brought against him there, and a judgment in Texas that lands in New Jersey of an intestate dying in 1860, vested in his eldest son exclusively, would have to be executed here.

The enforcement of a decree by attachment is the putting it in execution; it is, in that case, the process of execution. The only effect of a foreign judgment is, that it entitles the plaintiff to a new decree, not to the process of the court of another state.

The judgment in this case, that the deed was void, was a judgment as to the title of lands in this state, which the Kentucky courts had no jurisdiction to make; and they had no jurisdiction to decree a conveyance or delivery of possession, founded on that decree. This differs from the case of a contract to convey lands, which is a personal obligation to be determined by any court having jurisdiction of the parties.

Nor is the general rule of law varied by the Federal Constitution, or the act of Congress, declaring that the records and judicial proceedings of the courts of any state, shall have such faith and credit given to them, as they had by law or usage in the courts of such state. Justice Story, in his Commentaries on the Conflict of Laws, § 609, says: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties or the *subject matter*, nor an inquiry whether the judgment is founded in, and impeachable for, a manifest fraud. The Constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction

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over persons and things within their territory. It did not make the judgments of other states domestic judgments, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgment, without a new suit in the tribunals of other states."

The Supreme Court of the United States in *D'Arcy v. Ketchum*, 11 *How.* 165; and the state courts in *Starbuck v. Murray*, 5 *Wend.* 148; *Shumway v. Stillman*, 6 *Ibid.* 447; *Gleason v. Dodd*, 4 *Metc.* 333; *Ewer v. Coffin*, 1 *Cush.* 28; *Aldrich v. Kinney*, 4 *Conn.* 380; *McKean v. Beedey*, 31 *Maine R.* 316; *Arndt v. Arndt*, 15 *Ohio* 33; *Moulin v. Insurance Co.*, 4 *Zab.* 222, and in many other cases, have held that the act of Congress gave no validity to judgments against a person not within the jurisdiction of the court that gave it, which, of course and *a fortiori*, would include any case in which the court had not jurisdiction of the cause or subject matter.

No case could be devised to illustrate the soundness of this position better than the present. Davis and Headley both resided in Morristown. Davis sold a house and lot there to Headley, for \$9000; in payment, not in exchange, for which Headley conveyed to him one-sixth of two tracts of land in Kentucky, and agreed after five months, on a certain contingency, to convey certain other lands in Kentucky, and shares in a mining company. In a suit brought in Kentucky, while both parties resided here, for damages for failure in title of the lands conveyed, and non-performance of the contract to convey the other property, the Kentucky court declares the conveyance of the Morristown property to Headley void. No such judgment could have been rendered in New Jersey, or according to the law *rei sitae*.

A judgment in New Jersey could not change the title to lands in New York. Nor could a recovery in the Monmouth Circuit in ejectment, or any other action determined upon the title, affect the title to lands in Essex, or be enforced by an action brought in the county in which the lands are

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situate. It would be void as the judgment of a court not having jurisdiction of the subject matter.

The Kentucky judgments must also be held void for fraud in obtaining them. That fraud will avoid a judgment of another state, is laid down by Story in the passage cited, and many other authorities. Courts of equity will set aside judgments of their own state, and of other states on this ground. *Moore v. Gamble*, 1 *Stockt.* 246; *Tomkins v. Tomkins*, 3 *Ibid.* 512; *Glover v. Hedges*, *Saxt.* 119; *Powers' Ex'rs v. Butler's Adm'r*, 3 *Green's Ch.* 465; *Pearce v. Olney*, 20 *Conn.* 544; *Dobson v. Pearce*, 2 *Kern.* (11 *N. Y.*) 156.

In *Pearce v. Olney* a judgment was obtained in New York, after fraud in violation of a promise to the defendant, that the suit should not be proceeded in without further notice to him. The court in Connecticut, for this fraud in obtaining the judgment, declared it void, and restrained further proceeding upon it; and this was held in *Dobson v. Pearce*, to be a valid defence in another action brought upon that judgment in New York.

In this case it is proved to my satisfaction, that Headley settled this suit in Kentucky with Davis in 1857, after which Davis, in fraud of that settlement, proceeded in Kentucky. That again in 1860, after Headley had appealed, another settlement was had, and that all subsequent proceedings, including the judgment in the Court of Appeals, and in the Circuit after the remittitur, were in fraud of that settlement, and without the knowledge or action of Headley. This fraud is of the same kind as that in *Pearce v. Olney*.

It is true, in this case fraud is set up in defence, in that it was in support of a suit to set aside the judgment, or rather to restrain further proceedings on it. But in a court of equity, this will make no difference; it will not lend its aid to enforce a judgment obtained by fraud, when that fraud is shown. The complainant must come with clean hands in the matter on which relief is sought.

The publicists make a distinction as between foreign judg-

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ments when used in defence, to show that the matter sued for is *res adjudicata*, and when sought to be enforced by the courts of another sovereign. They hold that no court is bound to enforce a judgment of another sovereignty when it is apparently unjust and against universally acknowledged principles of right. *Story on Confl. of Laws*, §§ 593, 599, 618.

Besides the fraud in proceeding in this suit after the settlements, the record itself, which contains, as required by the code of Kentucky, the documents on which the suit is founded, shows that the cause of action on which the suit of Davis was based, was utterly without foundation in law or the principles of law and equity, as acknowledged in all countries and recognized as the *jus gentium*. This is so evident that it is impossible to avoid the conviction that these judgments in Kentucky must have been procured by fraud on the courts that authorized their entry, by concealing or misrepresenting the facts contained in the record when moving for the judgment.

The proceeding by which the title to the one-sixth of the fifteen hundred acre tract is alleged to be affected, was a suit begun after the conveyance to Davis, against Headley and one MacHenry, on two commercial endorsements of MacHenry, to which Headley was made a party, according to some law in Kentucky, because he owed MacHenry, and an alleged promise of Headley to pay the notes endorsed by MacHenry, and an attachment prayed against Headley's land, because he was returned as a non-resident. Judgment was given in this suit against both, and the fifteen hundred acre tract sold to pay it. The title of Davis could not be affected by sale to satisfy a judgment in a suit begun after the conveyance to him, to which he was no party. The suit by which the title to the one thousand acre tract was alleged to be affected, was also begun after the deed to Davis, and without making him a party, and the judgment left an undivided fourth of the tract in Headley, more than sufficient to ensure the sixth conveyed to Davis unaffected by the decree, even if it could have affected Davis.

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The only other stipulation on Headley's part, was one to convey one-sixth of an eight hundred acre tract, and a corporator's right in a mining company, joined in one article, which expressly provided that before he should be bound to convey either, Davis should pay him \$545.63, which the petition admitted had not been paid, either by Davis or one Goodall, to whom the petition alleged Davis had agreed to look for it, but it stated no release from the condition that Headley need not convey until payment.

On such a record, no judgment could be obtained without fraud or imposition on the court. This fraud is a defence to the judgment. Had it been positively shown, by such proof as would overcome this presumption, that this error had been committed by the court by mistake or perverseness, it might not have affected the judgment in this collateral way.

The principles adopted by the Supreme Court of this state in *Munday v. Vail*, 5 *Vroom* 418, in giving effect to the judgment of one of its own courts of record, that the validity of the judgment would only be recognized so far as the pleadings would authorize it, would leave the judgments in Kentucky, as to the real estate, without effect. The petition and the amended petitions state no facts upon which, by any principle of law acknowledged any where, the deed to Headley could be pronounced void. And the law of this state, the *lex loci rei sitae*, controlled. The prayer is for judgment for \$12,000 damages, and "all other proper relief." The last could only apply to relief warranted by the facts stated in the petition. It does not appear that any relief could ever be had by such prayer, under the Kentucky code, which, in § 118, pl. 4, requires that the plaintiff shall put in his petition, a demand of the relief to which he considers himself entitled; this requirement could not be complied with by a demand of "proper relief." The demand of a rescission in the reply could not cure this, as that code, § 13, declares that there shall be no reply, except to a counter claim or set off in the answer.

If the claim is thus narrowed down to the judgment for

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\$213.50 in money, this is a mere money claim for which there is no appropriate remedy in a court of equity. It is simple debt, and I find no precedent of a claim on a foreign or domestic judgment for money, being enforced in a court of equity.

FAUSEL vs. SCHABEL.

An agreement by a mortgagee to go into partnership with the mortgagor and to cancel a mortgage held on the premises where the business is to be carried on, as the mortgagee's share of the capital, if abandoned before the next payment of interest becomes due, does not amount to an agreement to extend the time of payment of the interest so as to save a forfeiture of credit, incurred by the non-payment of interest.

This case was submitted for final decree on pleadings and proofs, without argument.

THE CHANCELLOR.

The suit is to foreclose a mortgage for \$13,000, payable on March 1st, 1872, with interest payable quarterly from March 1st, 1869, the date of the mortgage, with the provision that if the interest should not be paid within thirty days after it became due, then the whole principal should be due. The interest that became due December 1st, 1869, was not paid and was not tendered until March 2d, 1870. The complainant brought suit after the thirty days and before the maturity.

The answer sets up the defence that the complainant agreed to extend the time of payment to March 2d, 1872. No proof of such agreement is made or offered. The complainant offered that complainant, in November, 1869, agreed to go into partnership with Schabel and one Ruh, and to cancel this mortgage as her part of the capital. The defendant offered evidence against such agreement. But if it were proved, it clearly was abandoned; for on the 2d

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November, 1869, papers were executed and delivered, by which Schabel sold to Ruh the premises and brewery in which the business was to be carried on, and was to be employed by Ruh as foreman in the business, at the compensation of \$80 per month and one-fourth of the net profits. Even this arrangement was abandoned before the thirty days expired. The defendants have failed to establish the defence set up in the answer, or any defence, or excuse, for the default in payment.

PERKINS *vs.* ELLIOTT and wife.

1. A married woman has no power to charge her separate estate by any writing, even though it contain words which show a clear intention to bind such estate, except a mortgage acknowledged as required by law, or for debts contracted for the benefit of her separate estate, or for her own benefit on the credit of it.

2. The words, "the said obligation to be charged upon the separate estate of the said Louisa Elliott," in a note, signed by a married woman as surety for her husband, do not create a lien upon her separate estate.

This cause was argued on bill and demurrer.

Mr. Vanatta, in support of the demurrer.

Mr. Pitney, contra.

THE CHANCELLOR.

The defendant, Louisa Elliott, held property to her separate use, under the act for better securing the property of married women. In January, 1870, she signed a note, with her husband, and as his surety, for \$4000. The debt was not for her benefit, or that of her separate estate; but the note contained these words: "the said obligation to be charged upon the separate estate of said Louisa Elliott." The object of

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this suit is to have this debt declared a lien upon her separate estate.

For the reasons in former opinions in the cases of *Peake v. Labaw*, 6 C. E. Green 269; *Armstrong v. Ross*, 5 Ibid. 109; and *Harrison v. Stewart*, 3 Ibid. 451; I am of opinion that this debt cannot be declared a lien. This case differs from *Peake v. Labaw*, in this—that the note in that case did not contain the words making it a charge upon the real estate. But it is within the principles of that decision as to the power of a married woman to charge her estate by any writing, except a mortgage acknowledged as required by law, or for debts contracted for the benefit of her separate estate, or for her own benefit on the credit of it. These last cases are established by a series of decisions, and have an equitable foundation in the necessity for the protection of her separate property, and to provide for her own necessities out of property settled to her use. The manner and extent of equitable relief was founded on cases in which married women had separate property, vested in trustees for their separate use, with power of appointment. But the right to the relief was not founded on these cases; for in them, it was dependent on the power of disposing by appointment; the courts determining what contracts should be held to amount to appointment.

In this state, no power has been given by statute for married women to dispose of their separate property. The decisions of this court, referred to fully in *Ross v. Armstrong*, held the power to exist, in the cases and for the purposes above specified. This was rendered necessary, for the reasons above stated; but in no case has it been held to extend further; and these purposes have been carefully laid down, in almost every case in this state, as the limits of the power. It is true that no adjudication determines that it shall not extend beyond them. But the reasons for the doctrine, so far as established, do not extend to being surety for a husband or a stranger. The difficulty in the way, is the want of power in the wife to bind her property, even when she clearly intends to bind it.

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The married woman's act, in New York, as amended in 1849, gave express power "to convey and devise her separate property, and any interest and estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried." In this respect it differs from the New Jersey statute, which contains no such power.

Hence, Justice Selden, in the beginning of his opinion in *Yale v. Dederer*, 22 N. Y. 450, says: "That the power conferred by those statutes, to convey and devise all their real and personal estate, as if unmarried, carried with it the power to charge such estate, substantially, in the manner and to the extent previously authorized by the rules of equity in respect to separate estates." Upon this basis the discussion is had in that case, whether the mere signing a note, as surety for her husband, with proof by parol that credit was given to her separate estate, would amount to a charge. The whole court held that it would not; and a majority held, that the intention to charge the separate estate must be stated in the contract itself. The point of the decision is, that the separate estate of a married woman shall not be charged for her undertakings as surety by mere implication.

The later decision of the same court, in *The Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613, relied upon by counsel in the argument, does not affect the views taken in *Yale v. Dederer*, or in *Armstrong v. Ross*, and *Peake v. Labaw*. In Mrs. Babcock's case, she had added to her special endorsement express words, charging the payment of the note on her separate property. This satisfied the objection that arose in *Yale v. Dederer*. The only question raised was as to the power. The charges had been made in writing in the contract, and was good, if she had the power to make it. Since *Yale v. Dederer*, the statute of 1860 had enacted, "that any married woman, possessed of real estate as her separate property, may bargain, sell, and convey such property, and enter into any contract in reference to the

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same." On this provision, and that in the previous act of 1848 and 1849, the court expressly place the power to charge the property; and further hold, that this written general charge on all her separate property was sufficient, without describing or specifying the property. I concur in this conclusion, fully. The defendant had by law power to dispose of her property, or to make any contract relating to it. For a good consideration, by writing, for that very purpose, she charged the debt upon her separate property.

In this case, if there had been a statute in New Jersey similiar to those in New York above referred to, I should feel bound to declare this debt a lien upon the separate estate of Mrs. Elliott; but the legislature of this state have not adopted these provisions, or passed any act of like import. It is notorious that acts proposing like amendments to the married women's act, have been repeatedly rejected by the legislature. I am not disposed, by judicial legislation to make any changes in the law which the appropriate department has refused to make; much less this change which will take from married women one of the few protections left to them from the importunities of their husbands, or more often, of their husbands' creditors. This especially should not be done, on pretence of carrying out the provision of an act for better securing the rights of married women

The bill must be dismissed.

 BLACK and others vs. THE DELAWARE AND RARITAN CANAL COMPANY, and others.

1. The act of March 17th, 1870, authorizing the United Railroad and Canal Companies of New Jersey "to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company or companies in this state or otherwise, with which they are or may be identified in interest, or whose works shall form with their own, continuous or connected lines, or to make such other arrangements for connection or connection."

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dition of business with any such company or companies by agreement, contract, lease, or otherwise, as to the directors of said United Companies may seem expedient," gives authority to the United Companies to lease to a corporation of another state.

2. The works of the United Companies form both connected and continuous lines with the works of the Pennsylvania Railroad Company. Two railroads form a continuous line, when their tracks and rails join so that a train may pass from the tracks and rails of one directly upon those of the other. They form a connected line, when this is done by means of an intervening or connecting road.

3. The directors of these companies have power to sell, or otherwise dispose of any of the property of the companies, except the roads and canal, and the franchises granted, without the consent of the state or of all the stockholders.

4. They have power, by consent of the state, and a majority of the stockholders, or of any other proportion required by law, to sell or lease, or otherwise dispose of these works, or to abandon them.

5. A lease made by virtue of such authority, is within the power delegated to the directors, and there is, in the charter of these companies, no express or implied contract violated by it, and, therefore, the act authorizing it is not unconstitutional.

6. The purpose for which these works are leased, the benefit and advantage of extended public highways, controlled and operated by one head, for regular and easy communication from and through New Jersey and other states, is a public use for which property may be taken by condemnation.

7. Even if the directors had not power to lease for a term, so as to bind the stockholders or their successors, the leasing and delivering the works to the lessee, with a stipulation and obligation to have the shares of dissenting stockholders valued and paid for, is not taking property without first making compensation. The shares, and not the works, are the property of the stockholders, and these are not taken until paid for.

8. The Pennsylvania Railroad Company, the proposed lessee, has, by its charter and supplements, and the public laws of Pennsylvania, power to take the lease, and bind itself to all its stipulations. The courts of one state, in construing the statutes of another state, will be governed by the decisions of the courts of that state.

9. A statute to authorize a corporation to lease or transfer the franchises, rights, and powers granted to it, unto another corporation, with no increase of franchises or privileges, is not such grant by the state as requires the same strict rule of construction, that is applied where the state creates franchises, or originally grants rights. It relates to the transfer of the rights and property of one citizen to another.

10. An injunction will not be granted, unless the right of the applicant, alleged to be violated by the proceedings sought to be restrained, is settled and clear.

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11. It is not always necessary that the right or title of the applicant for an injunction should have been settled by an adjudication of a court of law. If the facts on which the right is founded, are admitted or clearly established and the principles of law on which it depends have been adjudicated or are settled, a court of equity may apply these principles to the facts, and grant an injunction upon a right so ascertained.

12. But where the facts are doubted, or the principles of law on which the right of the applicant depends, are disputed and may admit of doubt, and have not been adjudicated and established by the courts of law in this state an injunction will not be granted until the right of the complainant has been established at law.

The bill in this cause was filed June 23d, 1871, by John Black and others, stockholders in the three corporations defendant, for themselves and such other stockholders as might choose to come in and cause themselves to be made parties, against the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, commonly called the United Companies of New Jersey, and the directors, respectively, of said companies, to restrain the execution of a proposed lease of the works of the said United Companies to the Pennsylvania Railroad Company.

The bill shows that the several complainants hold a certain number of shares of stock in the said United Companies, respectively.

The bill sets forth at length the rights, powers, privileges, immunities, and franchises vested in the said United Companies, and to which they were respectively entitled under and by virtue of their respective acts of incorporation, and the several successive supplements thereto; and also the provisions, conditions, liabilities, limitations, and restrictions to which the said companies were, by their said charters and the said supplements thereto, respectively subject; and also the rights and privileges therein and thereby vested in the state of New Jersey.

It shows that under the aforesaid acts of incorporation, the said companies were respectively organized; and that

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under said acts and the acts supplemental thereto, large sums of money were raised, by subscriptions, loans, &c., whereby real and personal property of great value were acquired.

That, subject to all the conditions, limitations, restrictions, uses, and trusts in any wise imposed on them by their said acts of incorporation and the supplements thereto, the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad Company, (usually called and known as the Joint Companies,) on the 1st day of February, 1867, entered into an agreement with the New Jersey Railroad Company for the purpose of consolidating and uniting their respective interests; and that said agreement was authorized and confirmed by an act of the legislature.

The bill further shows that, under and by virtue of the said companies' acts of incorporation and consolidation, and the several supplements thereto—all of which, it alleges, were accepted by the United Companies, and acquiesced in by all of their respective stockholders—and of other laws of this state, and of the agreements between them, the said United Companies own, and are in the absolute possession, enjoyment, and use of the Delaware and Raritan Canal, and the feeder thereof; the Camden and Amboy Railroad, Trenton Branch Railroad, New Jersey Railroad, Princeton Branch Railroad, Trenton Spur Railroad, Jersey City ferries, and Harsimus Cove property, with all their other branches, lateral and side roads, appendages, equipments, and appurtenances; and of all the corporate rights, powers, liberties, franchises, and privileges in any wise granted or belonging to them; but subject, nevertheless, to all the restrictions, limitations, conditions, taxes, and impositions in anywise reserved, imposed, or otherwise existing, under or by virtue of said acts, and other laws of this state. And that, in like manner, the said United Companies own and are in the absolute possession, enjoyment, and use of a very large amount of other property, real and personal, not strictly appertaining to their said works, as above particularly men-

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tioned, with all the estates, rights, incidents, privileges, and appurtenances in anywise belonging thereto.

It further shows, that the actual cost of the aforesaid properties of the United Companies, as officially stated in their last annual report to the legislature of this state, for the year ending on the 31st of December, 1870, and sworn to by their respective presidents, and which the complainants believe to be substantially true, is the sum of \$35,245,629.41; and they believe that the actual worth of said properties is not less than \$50,000,000; and that the sum of their aggregate capitals, then, was \$18,990,677.50, making, with their indebtedness, as therein stated, a sum just equal to the said cost of their properties.

It further shows, that the moneys invested in the capitals of said United Companies have been exceedingly productive to the stockholders; and judging from the past, and looking to the unparalleled location of their works between the two great and growing cities of this country, promise to become much more lucrative to them in the future, if their property and franchises, under the protection and guardianship of the laws of this state, shall be continued, and with special reference to which those investments were originally made, and have been since enlarged and continued; that the average of the dividends upon the stock in the aforesaid joint companies—to wit, the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad and Transportation Company—from 1833 to 1871, a period of thirty-eight years, has been twelve and twenty-hundredths per cent.; and that, although the complainants have not at hand the materials to estimate the productiveness of the other of said United Companies, to wit, the New Jersey Railroad and Transportation Company, yet they believe that, for nearly the same period of time, it has been equally productive; and they believe that, with like management and care, for a coming period of thirty-eight years, average dividends, of at least fifteen per cent., may be rationally and confidently expected.

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It further shows, that although the *legal* title to the aforesaid properties is in the said several corporations, constituting said United Companies, yet they are, in truth and fact, but mere ideal or artificial persons, created by law for the purpose of taking, holding, managing, and preserving the properties of their stockholders, as their naked trustees, without interest; and that the real, equitable, and beneficial estate and interest in said properties, and in all the dividends and income accruing, and to accrue therefrom, are in said stockholders; and that every act or thing which takes, destroys, endangers, or in any wise injures those properties, or any of them, or lessens their value or productiveness, is an injury to those stockholders, and not to their said trustees. And that any act or thing which, without the consent of those stockholders, or by due process of law, destroys those trustees, to whom those stockholders have confided their property; or which prevents those trustees from fully and freely performing their trusts; or which, in whole or in part, substitutes new or other trustees; or which constrains those stockholders to sell, assign, or transfer their stock or estates and interest in those properties to their said trustees, for their own use or the use of any other person, natural or artificial; or which takes from those stockholders their stock or estates and interest in those properties, for any other than a *public use*, within, and for the benefit of, this state; or which, for such public use, takes from those stockholders their stock or estates and interest in those properties, without just compensation being *first* made to them; is an unjust and unconstitutional act, violative of the just and legal rights of those stockholders over their own property, and an impairing of the incidental contracts between the state of New Jersey and those corporations, and between those corporations and their respective stockholders.

It sets out at length, the act of March 17th, 1870, the preamble and first section of which are as follows :

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“ An act to enable the United Railway and Canal Companies to consolidate their stock, and to consolidate or connect with other companies.

“ WHEREAS, the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, sometimes called the United Companies, and the United Railway and Canal Companies, are identified in interest, and have also an identity of interest with the Philadelphia and Trenton Railroad Company and other companies; therefore,

“ 1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That it shall and may be lawful for the said United Companies, by and with the consent of two-thirds in interest of the stockholders of each, expressed in writing and duly authenticated by affidavits, and filed in office of the secretary of state, to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company or companies, in this state or otherwise, with which they are or may be identified in interest or whose works shall form with their own continuous or connected lines; or to make such other arrangements for connection or consolidation of business with any such company or companies by agreement, contract, lease, or otherwise, as to the directors of said United Companies may seem expedient; *provided*, that if any stockholder or stockholders, being such at the time of making any such consolidation, agreement, contract, lease, or other arrangement, shall be dissatisfied with the same, the said companies shall pay to such dissatisfied stockholder or stockholders, the full value of his, her, or their stock, immediately prior to such consolidation, agreement, contract, lease, or other arrangement, to be assessed by three disinterested commissioners, appointed for that purpose by the Supreme Court or Court of Chancery of this state, on the application of either party, made upon twenty days' notice; but the said companies shall not be compelled to pay for stock of any such dissatisfied stockholder or stockholders

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unless he or they shall give written notice of such dissatisfaction to the president, secretary, or treasurer of the company, whose stock shall be held by him or them, within three months after such consolidation, agreement, contract, lease, or other arrangement, shall have been made and consented to by the requisite number of stockholders; *provided, further*, that no such consolidation, agreement, contract, lease, or other arrangement, shall have the effect, or be construed to release or discharge the said United Companies, or any or either of them, or any company or companies with which any such consolidation, agreement, contract, or lease, may be made, from any taxes, liabilities, obligations or duties, which they, or either of them, may be subject or liable to, either to this state, or to any other person or persons."

It further shows, that the said act has never been submitted to the board of directors of either of said United Companies, or to the stockholders of either, for acceptance; nor has it ever, in any way, been accepted or acquiesced in by either of said companies, or by the complainants, or any or either of them. But, on the contrary, the complainants have, from time to time, resisted said act and denied its validity and opposed the exercise, by said companies, of the powers granted or claimed to be granted by it. They, therefore, submit that, as to said companies and each of them, and as to the complainants, the said act is void.

The bill sets forth the names of the directors of the United Companies. It sets forth the submission of an indenture of lease to the joint board of the United Companies for their consideration and approval. It shows that the United Companies, and the Philadelphia and Trenton Railroad Company, were therein named as lessors, and the Pennsylvania Railroad Company was named as lessee; that the object and general import of said indenture was, and is, to grant and demise, by the said lessors, all the aforesaid canal, feeder, and railroad of the said United Companies, with all their appendages, equipments, and all the other property, real

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and personal, hereinabove mentioned and referred to, and all their corporate powers, franchises, and privileges, with all and singular their appurtenances, together with a certain other railroad, therein stated to be owned by the said Philadelphia and Trenton Railroad Company, extending from some point within the city of Philadelphia, in the State of Pennsylvania, to the Delaware river, opposite the city of Trenton, with its franchises, appendages, property, and appurtenances, for the term of nine hundred and ninety-nine years; yielding and paying therefor, in equal quarterly payments, the yearly rent of \$1,948,500.

It sets forth the resolutions of said joint board, declaring the expediency of said lease, on the terms and conditions therein set forth, and appointing a committee to submit the said lease to the stockholders and obtain their consent in writing, in proper form, and to do all things necessary to consummate the negotiation therefor; and directing the execution of the lease, in case two thirds in interest of the stockholders consent thereto.

It further shows, that most of the members of said committee, ever since their said appointment, have been, and now are, actively engaged, by themselves and others in their employ, in obtaining the consent of the stockholders of said United Companies to said lease; and the complainants believe and charge that it is their intention to persevere in their efforts until they shall obtain the consent of two-thirds of said stockholders, and then procure the execution of said lease by the said United Companies, respectively; and that it is the intention of a majority of the members of said joint board, at the earliest time practicable, to have the said lease executed and delivered; and they believe and charge that the said committee, and a majority of said board, will carry their said intentions into complete execution, and that the officers of said companies will seal and deliver said lease, unless they and said United Companies shall be restrained therefrom by this honorable court.

The bill further shows, that the said Pennsylvania Rail-

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road Company is a corporation created by and under the laws of the state of Pennsylvania, and exists only under and by virtue of the laws of that state, from which it derives its powers and franchises, whatever they may be; and that it is incapable of existing, living, or being in this state, except only by sufferance and permission, based on an assumed comity of friendly nations. And the complainants, therefore, respectfully submit and charge, that it has not, and cannot have, the right or power to become the lessee of the aforesaid properties, powers, franchises, and privileges of the said United Companies, as contemplated by said indenture, for the term therein stated, or of any of those properties, powers, franchises, and privileges, for any lesser or greater term; that, as such foreign corporation, it is incompetent and incapable of taking, having, holding, or using said properties in this state, and of exercising those powers, franchises, and privileges in this state, or any of them; and that it is, also, incompetent and incapable of discharging the trusts, duties, obligations, and other liabilities which, by the laws of this state, have been and are imposed on the said United Companies, and each of them, and from which trusts, duties, obligations, and other liabilities these companies, on their part, are alike incapable of either discharging themselves, or of transferring them to others.

It further shows, that the only authority which the said joint board of the United Companies, or the members thereof who voted for the making of this said indenture of lease to the said Pennsylvania Railroad Company, have or pretend to have, is the said act of March 17th, 1870. That, although the complainants deny the validity and constitutionality of said act, yet admitting its constitutionality and validity, they respectfully submit that it confers no power on said United Companies, either jointly or severally, to make the said indenture of lease to the said Pennsylvania Railroad Company; or by such indenture, or any other agreement, contract, or arrangement to grant, demise, or in anywise assign or transfer the said properties, franchises, powers, and

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privileges to the said Pennsylvania Railroad Company. That the powers conferred by that act on the said United Companies, to consolidate and enter into agreements, contracts, leases, and other arrangements with other railroad and canal corporations, is confined to other railroad and canal corporations of this state, with which the said United Companies are identified in interest, or whose works form, with the works of said United Companies, continuous or connected lines; and not with any railroad or canal company of another state, or not identified in interest with said United Companies, or whose works do not form, with those of said United Companies, continuous or connected lines.

It further shows and expressly charges, that the said Pennsylvania Railroad Company is not a railroad or canal corporation of this state; that it is not identified in interest with the said United Companies, or any or either of them; and that its works do not form a continuous or connected line with the works of the said United Companies, or any or either of them, according to the true intent and meaning of said act. On the contrary, that the said Pennsylvania Railroad Company is a corporation of the state of Pennsylvania; that its interests, instead of being identified with those of the said United Companies, are hostile to them; and that the said contemplated lease is intended to assuage that hostility, and to *create* an identity of interest; and that its works, instead of being continuous or connected, are detached and separated from those of the said United Companies, as follows, viz. either by the bridge of the Trenton Delaware Bridge Company, the railroad of the Philadelphia and Trenton Railroad Company, and the railroad of the Connecting Railway Company, which extend, consecutively, from the most westerly terminus of the said United Companies' work at Trenton, in this state, across the Delaware river at Trenton, and thence, in the State of Pennsylvania, to Mantua, in that state, a distance of about thirty-one miles; or else, by the open Delaware river, opposite the city of Camden, in th

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state, and the densely populated city of Philadelphia, in the state of Pennsylvania, a distance of about three miles.

It further shows, that there are not in the charters of said United Companies, or in either of them, or in any of the said supplementary or other acts relating thereto, any reservations of power to the legislature of this state, to repeal, alter, or suspend said charters, or either of them, in the discretion of said legislature, or without the consent of said companies or their stockholders; that each of said charters was granted to said companies, respectively, prior to the enactment of the general act of this state concerning corporations, approved on the 14th day of February, 1846, enacting, in substance, that the charter of every corporation which should thereafter be granted by the legislature should be subject to alteration, suspension, and repeal, in the discretion of the legislature. And the complainants, therefore, respectfully submit, that neither of said charters can be repealed, or materially altered, by the legislature, without the consent of said companies and their stockholders; nor can any act, which in itself repeals or materially alters, or which authorizes a repeal or material alteration of said charters, be or become a law, as to said companies, until accepted by them, or so acted upon or acquiesced in by them as to be tantamount to such acceptance; and that the granting of said charters constituted a contract between the state and these companies, respectively, to the effect that no such repeal or alteration should be made without such consent; and constituted, also, a contract between those companies and their respective stockholders, to the effect that the management of the affairs of those companies, respectively, should continue, in substance, as provided for in their charters; and that no act should be done by said companies, or the directors and other officers managing and conducting their affairs, which should, directly or indirectly, change, materially, the organic provisions in their charters, or should take from those stockholders, in whole or in part, the control of those companies, in the manner provided for in their

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respective charters; and that those contracts, and any others expressed or implied in those charters, are protected from being impaired, directly or indirectly, by the legislature, both by the Constitution of the United States and of this state.

It further shows and charges, that the said act of the legislature of this state—on which a majority of the members of the said joint board of the United Companies rely for their right and power to make said indenture of lease, as aforesaid—if it can, or ought to be construed to authorize or justify the making of such a lease to the said Pennsylvania Railroad Company, by the said United Companies, either by themselves or in connection with the said Philadelphia and Trenton Railroad Company, is invalid, unconstitutional, and void; and that it is, therefore, insufficient to authorize or justify the making of said lease for the following, among other reasons, viz.

First. Because the said canal and feeder and said railroads of the said United Companies are public highways of and within this state, and that it is not competent for the legislature of this state, directly or indirectly, to assign or transfer, or authorize to be assigned or transferred, the highways or the control of the highways of this state, to a foreign corporation.

Second. Because it is not competent for the legislature of this state to authorize the said United Companies, either in their joint or several capacity, or otherwise, to make or execute the said indenture of lease, or any lease of like import to the said Pennsylvania Railroad Company, and to deliver the demised property to that company.

Third. Because it is not competent for the said Pennsylvania Railroad Company to take, hold, or receive the properties demised, or intended to be demised by said indenture; or to perform, execute, or discharge the duties, trusts, obligations, contracts, and other liabilities of the said United Companies, which constitute the greater part of the consideration for the making of said indenture.

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Fourth. Because the making of such lease, and delivery of the demised property—if possible to do so to a corporation incapable of being in this state—would be a virtual dissolution or extinguishment of the said United Companies, and substitution of the said Pennsylvania Railroad Company in their stead, to take all their property and perform and execute all their powers, and discharge all their duties trusts, obligations, contracts, and other liabilities, without the consent of their stockholders and others to whom they are bound, and without making, or providing for the making of just compensation to those stockholders and others, whose property would thereby necessarily be taken, endangered, destroyed, or injured.

Fifth. Because the said United Companies are the trustees of their respective stockholders, to whom they have voluntarily confided the custody, care, and management of their property; and that the making of such a lease, and the delivery of the demised property to the said Pennsylvania Railroad Company, for the term mentioned in said lease, would be a substitution of that company, as trustee, in the place of said United Companies, and the taking of their property from their confidential agent, and giving it to another, without their consent and without just compensation, for no public use, either in or out of this state; and would be an impairing of the incidental contracts between this state and those corporations, and between them and their stockholders, in violation of the Constitution of the United States and of this state.

Sixth. Because the only provision made in said act for compensating the dissatisfied stockholders for the taking of their stock is, that its value shall be assessed as of the time immediately before the taking; but that the assessment thereof shall not be made, and compensation paid, until *after* the taking, while the Constitution of this state expressly requires compensation to be "*first made.*"

Seventh. Because the said act requires the dissatisfied stockholders to give up their stock to their own trustees, the

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United Companies, to take, either for the use of said companies, or else for the use of the said Pennsylvania Railroad Company; and that such is not a "public use," in this state or out of it.

Eighth. Because the said act, by requiring the dissatisfied stockholders to give up their stock to the United Companies, in order to enable them to carry into execution any agreement, contract, lease, or other arrangement which they may deem it expedient to make with any other of the companies mentioned in the first section of said act, thereby delegates, or attempts to delegate, to said United Companies, the right to decide what constitutes a "public use," sufficient to justify the taking of private property; which right can only be exercised, directly, by the legislature itself; and

Ninth. Because the charter of each of said United Companies commits the direct management of their affairs to a board of directors, to be chosen annually by their respective stockholders; and neither of those charters is liable to be repealed, or materially altered, without the consent of the company whose charter is sought to be repealed or altered, and of all the stockholders thereof; yet, if the act in question, as claimed, authorizes the execution of the lease in question, it enables the joint board of directors of the said United Companies to transfer the management of their affairs to a foreign corporation, over which they have no control for nine hundred and ninety-nine years; and yet, also, this act, which thus indirectly destroys those charters, by transferring the possession and management of their stockholders' property to an alien corporation, has never been, in anywise accepted, or submitted for acceptance, to either of said companies or their stockholders.

It further shows, that the making of the said lease, and delivery of the demised property over to the said Pennsylvania Railroad Company, would be a great and irreparable injury to the complainants, for which the law affords no adequate remedy, and from which, as they submit, they should be protected by the restraining power of this court.

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It further shows, that the complainants have authentic copies of all the aforesaid acts of the legislature, ready to be produced, not only in verification of the aforesaid statements concerning them, but also of all other their contents and provisions; and they pray that the said authenticated copies of said acts may be deemed and considered as annexed to the bill, and as a part thereof, the same being much too voluminous to be actually attached thereto.

The bill prays an injunction, to be directed to the United Companies, respectively, and the directors thereof, respectively, restraining the execution of the proposed lease to the Pennsylvania Railroad Company; and also requiring them to desist and refrain from making or executing any other agreement, contract, lease, or other arrangement to consolidate the capital stocks or business of the said United Companies, or either of them, with the capital stock of the said Pennsylvania Railroad Company, or to grant, demise, or lease the works of the said United Companies, or either of them, or their or any of their powers, franchises, or privileges, to the said Pennsylvania Railroad Company, for the term of nine hundred and ninety-nine years, or for any greater or lesser term.

Upon filing the bill, a rule to show cause, on the 25th of July, was granted, why a writ of injunction should not issue, according to the prayer of the bill. It further ordered the defendants to desist and refrain from executing, or procuring to be executed, the said lease, &c., until the hearing of the rule.

Upon the day fixed for the hearing of the rule, answers were filed and read.

The answer of the United Companies, admits that the several complainants are stockholders in the corporations defendant, respectively.

It admits the several acts of incorporation, and the supplements thereto, and the acts whereby said companies were

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consolidated, and the agreements between them, and other laws of this state, set forth in the bill of complaint. It admits that said acts were accepted, but denies that they were all acquiesced in, as alleged. It admits that the state is a stockholder in said corporations.

It admits that the United Companies were organized under their respective charters, and that under them, and the acts supplemental thereto, they raised large sums of money, and acquired real and personal property of great value; that the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad Company, entered into the agreement with the New Jersey Railroad Company, set forth in the bill, for purpose of consolidating and uniting their respective interests, and that said agreement was ratified by the legislature.

It admits that the United Companies own, and are in the absolute possession, enjoyment, and use of the Delaware and Raritan Canal and the feeder thereof, and of the Camden and Amboy Railroad, Trenton Branch Railroad, New Jersey Railroad, Princeton Branch Railroad, Trenton Spur Railroad, Jersey City ferries, and Harsimus Cove property, with all and every of their branches, lateral and side roads, (among which branch or lateral railroads is the said Philadelphia and Trenton Railroad,) and other property in said bill described, with the corporate rights, powers, franchises, and privileges, in any wise granted or belonging to them and each of them, and subject also as charged in the said bill; and also of a large amount of other property, real and personal, not strictly appertaining to their said works, with the estates, rights, incidents, privileges, and appurtenances, as charged.

It admits the costs of the said properties as stated. It denies that the actual worth of the said properties is not less than \$50,000,000. It admits that the aggregate capitals with the indebtedness of the said companies, make a sum equal to the cost of their properties as charged.

It admits that the moneys invested in the capital of th

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said companies have been productive to the stockholders, but have not been exceedingly productive; and denies that the moneys so invested promise to become much more lucrative in the future. It submits that by no possible immediate and direct management by the board of the United Companies, can the dividends upon the capital stock of the said United Companies be as large a per centage as they have been in the past, and that in the judgment and belief of the said united board, they cannot, by the most faithful, skillful, and economical management of the properties, powers, and privileges of the said United Companies, in view of the past and prospect of the future, by any direct or immediate management of the said works and properties by the directors of said companies, expect or reasonably hope hereafter to make dividends upon their capital stock exceeding ten per centum per annum, nor even so much.

It admits that the average dividends of the Delaware and Raritan Canal Company, and of the Camden and Amboy Railroad and Transportation Company from 1833 to 1871, have been about twelve and twenty hundredths per cent.; but such dividends have been caused partly by the fact that the capital of the said companies was small, and their bonded debt large, and said bonded debt was subject, a large part of it, to a low rate of interest, being a rate of interest of five per centum per annum, and partly by the fact that the said canal and railroad companies had the monopoly of the transportation of passengers and merchandise between New York and Philadelphia, across the state of New Jersey.

It says that the New Jersey Railroad and Transportation Company has, in times past, been almost as productive in its per centage of net revenue as the two companies formerly called the joint companies, but the revenue of the New Jersey Railroad and Transportation Company has been greatly diminished by reason of the fact of the competition now existing in the transportation of passengers and merchandise. That, between Newark and New York, there are now three railroads, where there was formerly one. The

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competition produced by the Newark and New York Railroad, and by the Morris and Essex Railroad, has taken away nearly all the profits from the business between the places last aforesaid. The competition produced by the Central Railroad of New Jersey, between New York and Elizabeth, has also greatly reduced the revenues of the New Jersey Railroad and Transportation Company.

It denies that it is possible for the United Companies for the coming thirty-eight years, with the utmost care and good management, to earn a net revenue of fifteen per cent. as charged, or any such per centage; and says that, on the contrary, the state of New Jersey is now open to competition by other railroad lines, which they clearly see will be constructed, and the effect of which must be, greatly to reduce the revenues of the United Companies.

The earnings on the cost of the works represented by capital and indebtedness were, in the year 1855, only eight and forty-five one hundredths per cent., while the amount earned on the stock, after paying interest on the bonds, was a little less than seventeen per cent. In 1868, with an average of eight per cent. of net earnings upon the cost of the works there was applicable to the stock, nine and one half per cent. When all the works became united, as the United Companies, the per centage of net earnings on the capital and debts, has been seven and twenty-six one hundredths, from and including the year 1867, to and including the year 1870.

Many of the causes which have led to these results will continue. The compensation for the transportation of passengers, merchandise, and chattels has decreased, and must still further decrease, and the expenses of operating railroads and canals have increased. The taxes paid to the Government of the United States have been very large. Loans made at an earlier date, at a low rate of interest, are constantly falling due, and have to be renewed at a heavy discount. In consequence of the competition with which the United Companies are threatened, they are and will

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compelled to enlarge and perfect their works, at a faster rate, than the ordinary increase of business would otherwise demand. To make the real estate of the United Companies at Jersey City profitable, and to prevent it from being a source of constant loss, large expenditures will be required, rendered necessary by western and other business. Warehouses, wharves, and piers must be constructed, and canals must be excavated at Jersey City. An elevated railroad from their main line in Jersey City to Harsimus cove must be built at great expense. Another track must be laid along a great part of the main line from Jersey City to Philadelphia. Expenditures for such purposes will necessarily amount to several millions of dollars, above the amount authorized by the said lease. These expenditures should be made by the Pennsylvania Railroad Company. That company is unwilling to incur them, without a lease of the property for a long term of years.

Without such additions and improvements, business will be diverted to other lines, and irreparable loss will result to these defendants. These defendants are unwilling to part with the entire control of their terminal property at Jersey City, for the reason that the value of the residue of their property would be permanently impaired. Such improvements should not be made by these defendants under agreements which, in the course of time, might be disregarded. If they shall be made by the proposed lessee, as they undoubtedly will be if the lease shall be executed, they will add to the permanent value of the property, and will afford great security for the payment of the rent reserved. For these, and many other reasons which might be suggested, these defendants deny the flattering prospects for the future set forth in the complainants bill.

The dividends which have been declared for the last four years by the said companies, have been made in some part, from the surplus heretofore accumulated by the application of revenue to construction, and which surplus is now wholly exhausted.

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It admits the passage of the act of March 17th, 1870, set out in the bill, and avers that the said act has been submitted to the board of directors of the said companies, as a joint or united board, which said joint or united board consists of the directors of the several boards, and the said act has been accepted by the said joint or united board, by a large majority thereof. That the directors of the said several companies can lawfully act in such a matter as the acceptance of the said law, only as a joint or united board. It avers, that the said act has been submitted to the stockholders of the said several United Companies, and the stockholders of each of the said companies, have assented to the same by more than two-thirds in interest of such stockholders. It denies that the said act required any formal acceptance, and says, that a compliance with the terms and conditions of the said act, was all that was requisite to entitle the said companies or the stockholders thereof to avail themselves of its provisions, which has been done; and insist, that the said act is operative and binding in law.

It admits that an unexecuted indenture of lease, previously prepared for the purpose, was submitted for the consideration and approval of the members of the joint board of directors of the United Companies, and if approved by said directors, the same will be executed by the several parties therein named, (not, however, without first obtaining the consent of two-thirds in interest of the stockholders of each in compliance with the said act of March 17th, 1870,) unless restrained by this honorable court.

It says, that more than two-thirds in interest of the stockholders of each of the United Companies, have given their consent, expressed in writing, to the said proposed lease, and desire that the said lease should be executed, in full compliance with the said act of March 17th, 1870. It admits that it is the intention of a majority of the said joint board, to have the lease executed and delivered at the earliest time practicable, as the act and deed of the several companies composing the United Companies.

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It insists that the Pennsylvania Railroad Company was, and is, both a proper and necessary party to the bill, and the omission of that company, as a party, should cause the bill of the complainants to be dismissed; and the same benefit is prayed, as if the defendants had demurred to the bill for want of proper parties. It says, that the Philadelphia and Trenton Railroad Company are ready to join in the said lease, as one of the lessors, and submits that the last named company is a necessary party to the said bill, and that no injunction can issue without making the last named company a party, and prays the same relief as if defendants had demurred to the bill for that cause.

It admits that the Pennsylvania Railroad Company is a corporation, created by the laws of the state of Pennsylvania, but denies the legal conclusion therefrom charged in the bill, and declares, that on the contrary, said company can lawfully, under the laws of the state of New Jersey, and of the state of Pennsylvania, as such laws now exist, become the lessee of the property and franchises in the said lease mentioned; and that the said proposed lessee, in case the said lease shall be executed, together with the said lessors, can perform lawfully all the duties, trusts, and obligations, and discharge all the liabilities imposed on the United Companies whether with reference to the state of New Jersey, or any corporations or individuals.

It says, that the said United Companies, as charged in the said bill, do claim that they have derived additional right and power, from the said act of March 17th, 1870, to execute the said proposed lease, when they shall have obtained the consent of two-thirds in interest of the stockholders of each of the United Companies, and shall have fully complied with the said act.

It claims and insists, that without the aid of the last named act, enabling them to make the said lease, the defendants had, and still have, the power to make the same; and they respectfully submit, that the complainants have no right to the injunction of this honorable court to restrain

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these defendants from executing and delivering the said lease, for the reason that the said lease will not impair any right of any of the complainants, and will not cause any injury to them or any of them.

It insists, that the last named act of the legislature of the state of New Jersey is constitutional and valid in law; that it confers full and ample power on the said companies to make, execute, and deliver the said indenture of lease to the Pennsylvania Railroad Company in form, in substance, and in legal effect, as the said lease has already been prepared and agreed upon; and, that if the said lease shall be executed and carried into effect, the United Companies or either of them, will not thereby, in any manner, be hindered, prevented, or incapacitated from fully and fairly performing and discharging all the duties and obligations which they, or any of them owe, either to the state of New Jersey, or to their stockholders; on the contrary, after the said lease shall have been executed and delivered, the United Companies, will be better able to perform and fulfill all and every of their duties, both public and private.

It insists that the powers conferred by the act of March 17th, 1870, for consolidation and making business arrangements, are not confined to railroad or canal companies of this state. On the contrary, one of the objects of the said act, as is most clear and apparent, was to enable the United Companies to lease their works to the Pennsylvania Railroad Company, for the reason that the railroad and canal corporations of the said United Companies were, when the said act was passed, and still are, identified in interest with the Pennsylvania Railroad Company; and the railroads of the United Companies formed, with the railroad of the Pennsylvania Railroad Company, both continuous and connected lines. The canal of the United Companies formed, when the said act was passed, and still forms, with the railroad of the Pennsylvania Railroad Company, a connected line of business and transportation. The works and business of the

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ited Companies, when the said act was passed, bore, and all do bear, such connections and relations with the works of the Pennsylvania Railroad Company, and the business thereon conducted, as to make the true intent, meaning, and purpose of the said act apparent beyond all doubt or controversy.

It admits that the Pennsylvania Railroad Company is a corporation created by the laws of Pennsylvania, but insists that it is not confined, in the exercise of the powers, privileges, and franchises, to that state alone; on the contrary, the Pennsylvania Railroad Company, by its railroads and works, and by the railroads and works of other corporations in other states and territories, with which it is connected by agreements, contracts, and leases, and with which it forms continuous and connected lines, is a part of a great system of internal communication, which extends from the Atlantic Ocean to the Pacific ocean, and which brings in close intercourse with the towns and cities of the Atlantic seaboard, the states and territories of the northwest, the west, the southwest, and south.

It denies that the Pennsylvania Railroad Company is to be identified in interest with the United Companies, and that the works of the Pennsylvania Railroad Company do not form a continuous and connected line with the works of the United Companies, or with any or either of them, as charged; and insists that the works of the United Companies form, with the works of the Pennsylvania Railroad Company, continuous lines, and also connected lines, within the true intent and meaning of the act of March 17th, 1870; and that the same are not detached therefrom, either by the bridge of the Trenton Delaware Bridge Company, or by the railroad of the Philadelphia and Trenton Railroad Company, or by the railroad of the Connecting Railway, or by any or either of them, in manner and form, substance and effect, as charged in the said bill. It denies that the open Delaware river separates the railroad of the Camden and Amboy Railroad and Transportation Company from the rail-

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road of the Pennsylvania Railroad Company ; and says that it is, in point of fact and in law, no severance of the works of said company, from the city of Philadelphia, and is no severance of the business connection of said company with the Pennsylvania Railroad Company, and it does not interrupt or interfere with the identity which exists, and did exist, on the 17th day of March, 1870, between the said Camden and Amboy Railroad and Transportation Company, and the Pennsylvania Railroad Company, or between the United Companies aforesaid and the Pennsylvania Railroad Company.

It submits, that the nine propositions in the said bill set forth, are unsound and erroneous in law, and have no application whatever to the rights of the lessors in the said lease to make, execute and deliver the said lease, or the said lessee to receive the same ; and are irrelevant to the case made by the said bill of complaint.

It denies that the making of the said lease, and the delivery of the demised property to the Pennsylvania Railroad Company, will be a great and irreparable injury to the complainants ; but, on the contrary, the same will be a great and permanent benefit to them.

The defendants are ready to refer to, accept, and receive the said acts of the legislature stated in the bill, and their contents, as instruments of evidence, subject to their true construction and legal effect, and will on their part refer to the same, and other acts of the legislature of the state of New Jersey and the state of Pennsylvania, having a bearing upon the subject matter before this honorable court in this cause.

It charges, that the bridge over the Delaware, and the railroad of the Philadelphia and Trenton Railroad Company, form a part of the works of the United Companies. The right to use the said bridge for the railroad of the companies formerly known as the Joint Companies, originally commenced by contract between "the president, managers, and company, for erecting a bridge over the river Delaware, at

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or near Trenton," with the Philadelphia and Trenton Railroad Company, in the year 1835. The defendants believe; that at the time of the making of said contract, the Joint Companies were the owners of more than one-half of the shares of the capital stock of the said Bridge Company; and, on the 1st of March, 1836, they were the owners of more than one-half, in amount and value, of the capital stock of the said Bridge Company. Under that contract railroad tracks were laid on the said bridge, on which locomotive engines and cars passed from the Trenton Branch Railroad and Spur, to the Philadelphia and Trenton Railroad, and returned, as the business required. The expense of laying railroad tracks on said bridge was nominally borne by the Philadelphia and Trenton Railroad Company, as was stated in the arrangement, but in point of fact was borne by the Joint Companies aforesaid. Subsequently, and on the 7th day of December, 1850, an agreement was entered into between the said Bridge Company and the Philadelphia and Trenton Railroad Company, whereby, for the consideration therein mentioned, it was agreed that the said railroad company should have permission to use the south part of the said bridge, for running railroad cars and other vehicles on and over the railway laid over the said bridge, for the period limited by the charter of the said railroad company. The railroad company thereby agreed to keep, at their own expense, the railway over said bridge, and that part of said bridge in repair, and would indemnify and save harmless the party of the first part from all loss, damage, or injury whatever, which the said bridge might sustain from the use aforesaid, by fire and locomotives or otherwise.

Semi-annual settlements should take place on the first Monday of April and October in each year. The amount for tolls from the 1st day of April, 1849, should be adjusted and settled on the terms of that agreement.

Such contracts, and the arrangements arising therefrom, though in form continued to the present time, have virtually ceased, by reason of the fact that the Philadelphia and

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Trenton Railroad Company and the United Companies are, and long prior to the year 1870 were, the owners of all the capital stock of the said Bridge Company, except one share. And these defendants charge that the Philadelphia and Trenton Railroad Company, and the United Companies, on the 17th day of March, 1870, were, and from thence have continued to be, the owners of all the capital stock of the said Bridge Company, except said one share thereof; and that the ownership of said stock was fully authorized by several acts.

The answer further says, that the railroad of the Philadelphia and Trenton Railroad Company, extending from the said Delaware bridge, in the state of Pennsylvania, to the city of Philadelphia, in said state, was one of the works of the United Companies, on the 17th day of March, 1870 and for many years prior thereto, and has continued as such until the present time.

On the 22d day of April, 1836, an agreement was made between the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad and Transportation Company of the one part, and the Philadelphia and Trenton Railroad Company, of the other part, by which agreement the said parties did covenant and agree with each other, and their successors, that from and after the 1st day of June then next ensuing, during and until the expiration of their said charters respectively, the clear profits arising from the stock of the said companies, (except so much thereof as had been theretofore transferred to the state of New Jersey,) should be divided among all the stockholders of the said several companies share and share alike. And it was further agreed that whenever the state of New Jersey should accede to the said arrangement, the stock of the Philadelphia and Trenton Railroad Company, should be put on the same footing as the stock of the Delaware and Raritan Canal Company and the Camden and Amboy Railroad and Transportation Company and that the exception thereby made of the stock transferred to the state of New Jersey by the said the Delaware and

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Raritan Canal Company and the Camden and Amboy Railroad and Transportation Company, was made from no invidious or improper intention, but simply because the companies believed it would be improper for them to attempt to bind the state of New Jersey, leaving the state of New Jersey to determine as it might see proper. It being by the said agreement expressly understood, that the state of New Jersey should have the option at any time to come in and participate in the benefits of the said agreement from the time of such option being made.

The answer avers, that since the making of the last mentioned agreement, the state of New Jersey, as a stockholder, and all the other stockholders of the Joint Companies, have borne the burdens and shared in the profits arising from the said agreement.

It charges, that the terms and conditions of the said agreement were fully complied with and carried into effect by the said companies, from the date thereof to the time of the agreement of union between the old Joint Companies and the New Jersey Railroad Company, February 1st, 1867, (which said agreement was validated by an act of the legislature) and from that time they have been fully carried into effect by the said New Jersey Railroad Company, as well as the original parties to said agreement.

The following clause in the said agreement between the said three companies, set forth in the bill, refers to the said agreement of the 22d of April, 1836: "That the agreement between the said parties hereto of the first part, and the Philadelphia and Trenton Railroad Company, and all other agreements and obligations now in force by or against either of the parties hereto, shall be binding on the consolidated companies composed of the parties hereto."

Since the union of interest affected by the said agreement of the 1st of February, 1867, and validated by the said act of February 27th, 1867, the said agreement of the 2d day of April, 1836, has been carried into effect, and complied with, by the Delaware and Raritan Canal Company, the Camden

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and Amboy Railroad and Transportation Company, the New Jersey Railroad and Transportation Company, and the Philadelphia and Trenton Railroad Company.

The complainants, who have been stockholders, as charged in the said bill, for five years last past, have had all the benefits arising from the said agreement; have received or become entitled to additional stock, distributed among the stockholders of the said Joint Companies and said United Companies; and have received dividends and profits arising out of the business of said four roads, which have been so operated as one concern. And the state of New Jersey, as a stockholder, has received the like benefits with the other stockholders, and has, in manner aforesaid, formally and by enactment as aforesaid, ratified and confirmed the said agreement as obligatory on the Joint Companies and on the Philadelphia and Trenton Railroad Company, and on the United Companies and the Philadelphia and Trenton Railroad Company, and as obligatory on the state of New Jersey as a stockholder, as the sovereign power which created and has confirmed the franchises, powers, and privileges of the said several companies composing the Joint and United Companies, whether conferred on them severally, or as Joint Companies, or as United Companies.

It further says, that the number of shares of the capital stock of the Philadelphia and Trenton Railroad Company is twelve thousand five hundred and ninety-one, and the United Companies are the owners of seven thousand six hundred and fifty of said shares; that under the powers conferred by the act approved April 15th, 1868, and under the other acts in this answer referred to, the said United Companies have the ownership and control, over the said Philadelphia and Trenton Railroad Company, conferred by the ownership of the said stock, and by virtue of the said agreement.

It further says, that by articles of agreement made and entered into on the 18th of February, 1863, by and between the Pennsylvania Railroad Company, the Philadelphia and Trenton Railroad Company, the Delaware and Raritan Canal, and

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Camden and Amboy Railroad and Transportation Companies, and the New Jersey Railroad and Transportation Company, and by agreements explanatory thereof and supplemental thereto, it was, among other things, provided and agreed, that the Pennsylvania Railroad Company would obtain the necessary right of way, and lay out and construct a first class railroad from the point on the Pennsylvania Railroad, at or near where it crosses Thirty-fifth street in the city of Philadelphia, about one mile from Market street, where the Junction Railroad crosses under said Market street, by some eligible and direct route, to some point on the Philadelphia and Trenton Railroad, at or near Frankford, crossing the Schuylkill river above Girard avenue bridge, with masonry constructed for a double track. And the Pennsylvania Railroad Company did, thereby, further agree, as soon as the said railroad connecting the Pennsylvania Railroad with the Philadelphia and Trenton Railroad should be constructed and ready for use, to execute and deliver to the Philadelphia and Trenton Railroad Company, a lease of the said Connecting Railroad, for a term of nine hundred and ninety-nine years; and that, from and after the said time, when the said Connecting Railroad should be so constructed and ready for use as aforesaid, until the expiration of the said term of nine hundred and ninety-nine years, the Philadelphia and Trenton Railroad Company, their successors and assigns, should have as full and exclusive use and control of said railroad, and its appurtenances and appendages, and all lands and rights therewith connected, as if they, the Philadelphia and Trenton Railroad Company, had been, from the first, the owners thereof.

In pursuance of the said agreements the said Connecting Railroad was constructed. It commences on the line of the Philadelphia and Trenton Railroad at Frankford, in the city of Philadelphia, and runs southwesterly, crossing the river Schuylkill near and above the Girard avenue bridge, and connecting with the railroad of the Pennsylvania Railroad

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Company about one mile and one quarter north of Market street in said city.

It further says, that by an act of the legislature of Pennsylvania, approved on the 14th day of April, 1863, the Connecting Railway Company was incorporated. Said company subsequently constructed said railroad. The stock of said Connecting Railway Company is owned by the Pennsylvania Railroad Company.

It further shows, that on or about the 1st day of January, 1868, an indenture of lease was made and executed between the Connecting Railway Company, of the first part, and the Pennsylvania Railroad Company, of the second part, and the Philadelphia and Trenton Railroad Company, of the third part, whereby the Philadelphia and Trenton Railroad Company became the lessees of the said Connecting Railway Company, extending from its two connections with the Pennsylvania Railroad, (one of said connections being at or near Fifth street, and the other at or near Fortieth street in Philadelphia,) to its connections with the Philadelphia and Trenton Railroad, at or near Frankford, with all the lands, bridges, right of way, lands, and other things appurtenant thereto, including, also, the right to purchase by the said Connecting Railway Company, whether for right of way or otherwise, and then to sell the same for the said Connecting Railroad Company; together with the full and exclusive right to run and use the said railroad, and to take the tolls and exercise the franchises and powers therewith connected, and the right to build on the said railroad additional tracks or sidings as may be lawful, at the expense of the said Connecting Railway Company, and to do all other lawful acts which they may deem necessary or expedient. Which term in said indenture is limited at nine hundred and ninety-nine years from the date of the said articles of agreement, which have been before referred to.

It expressly avers that by means of the said bill of the Delaware at Trenton, and the rails for a railroad, and by means of the said road of the Philade

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Trenton Railroad Company, and by means of the said Connecting Railroad, possessed, owned, and held as aforesaid by the said the United Companies, the works of the United Companies form with the works of the Pennsylvania Railroad Company, both continuous and connected lines.

It says that passengers, goods, wares, and merchandise, are transported over the works of these defendants by ferries or floats from the city of New York to Jersey City, thence in railroad cars by the New Jersey Railroad to New Brunswick, from New Brunswick to the Delaware bridge at Trenton by the railroad called the Trenton Branch and Spur; thence on a railway over the said Delaware bridge; thence by the Philadelphia and Trenton Railroad to the Connecting Railroad at Philadelphia; thence over the Connecting Railroad to and upon the rails of the Pennsylvania Railroad; thence over the Pennsylvania Railroad to Pittsburg, in the state of Pennsylvania, and from thence to various points northwest, west, and southwest. That the railroad cars drawn by locomotive engines, in which cars, passengers and merchandise are transported, pass by a continuous and unbroken line of railroad from Jersey City to Pittsburg, as aforesaid, the same cars being used, though owing to the long distance traversed, many locomotive engines are used for the same train, in which passengers and merchandise are carried from Jersey City aforesaid, to Pittsburg aforesaid, and beyond. Such was the state of facts on the 17th day of March, 1870, and prior thereto, and since the said Connecting Railroad was completed. That the said railroad line from Jersey City to Pittsburg, as aforesaid, was on the 17th day of March, 1870, and prior thereto, and from thence to the present time has been, used for business on the same from Jersey City to points west of Philadelphia on the said Pennsylvania Railroad, and practically operated as one line, under contracts and arrangements, and was one of the chief and essential means in carrying on the internal commerce and business of this country. This mode of communication between the state of New York, the state of Pennsylvania,

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and the West, has been fostered, protected, and legalized by the respective legislatures of the two last named states; and it was with a full knowledge of the vast magnitude of the internal commerce carried on by such agencies, and to facilitate and promote the same, that the said act of March 17th 1870, was passed, by which the said proposed lease was authorized. The concurrent legislation of the state of Pennsylvania, hereinafter stated, was a part of the same plan by which full authority was given to make the said lease; such legislation did not spring from the whims or caprice of speculators and adventurers, but from the demands for the means of intercourse, by which accommodation for every town and village along the line of transportation is afforded across the continent, and a shorter pathway is opened for commercial intercourse with the East Indies.

It further says that the Pennsylvania Railroad at Philadelphia extends to the Delaware river at two points; one at the Washington street wharf and another at the Greenwich wharves. The Camden and Amboy Railroad, which runs from South Amboy to Camden, is at Camden connected with Philadelphia by a ferry, owned and operated by the United Companies, which ferry has been declared to be a part of the line, and thus a connected line of business is formed between the last named railroad and the works of the Pennsylvania Railroad Company. The communication between the terminus of the Camden and Amboy Railroad at Camden, by ferry boats over the Delaware river, to the Washington street wharf aforesaid, at Philadelphia, and thence over the Pennsylvania Railroad, was on the 17th of March, 1870 and still is used for the transportation of merchandise over and from the Camden and Amboy Railroad, over the Delaware river as aforesaid, to the Washington street wharf aforesaid, and over the Pennsylvania Railroad aforesaid, as was provided for by the said contract of February 18th 1863. Where the Pennsylvania Railroad comes to the Delaware river, at the Greenwich wharves, coal, lumber, and merchandise, transported over the Pennsylvania Railroad

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were on the 17th day of March, 1870, and before and since, and to the present time, discharged into boats of the Delaware and Raritan Canal at Philadelphia, floating in the Delaware river, and in such boats transported up the Delaware to the canal, and from thence to New York and other destinations. The Delaware and Raritan Canal was, and is, thus connected directly with the Pennsylvania road as a connected line, making also an identity of interest between the Canal Company as one of the United Companies, and the Pennsylvania Railroad Company.

To show the identity of interest and connection in business between the railroads and the canal of the United Companies, and the railroad of the Pennsylvania Railroad Company, the answer states and shows the amount in money received by the United Companies, and the Philadelphia and Trenton Railroad Company, for passengers and freight delivered to and received from the Pennsylvania Railroad, in the years 1869 and 1870:

From passengers—

1869	-	-	-	\$161,857 70
1870	-	-	-	267,496 09

From freights—

1869	-	-	-	\$537,578 44
1870	-	-	-	545,191 61

The following number of tons of coal were transported over a portion of the Pennsylvania Railroad to the Greenwich wharves aforesaid, and from thence in the canal boats of the Delaware and Raritan Canal, on and over the said canal—

In 1869	-	-	-	147,788 tons
" 1870	-	-	-	175,000 "

It further answering, says, that the Pennsylvania Railroad Company is a corporation created by the laws of Pennsylvania, by an act of the legislature of that state, approved April 13th, 1846, having, by their act of incorporation, and by subsequent acts of the legislature of the last named state, full power to own and operate a railroad

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from Philadelphia to Pittsburg and beyond, and also having full power, by the laws of Pennsylvania, to merge and consolidate with any other railroad company, in that state or out of it, on compliance with the laws of the last named state. By the laws of the state of Pennsylvania, the said agreement of February 18th, 1863, and the said lease of the Connecting Railroad are valid. It charges, that by the laws of Pennsylvania, the Pennsylvania Railroad Company aforesaid can become the lessees of any railroads or canal navigation works whatever, whether such railroads or canal navigation works may be within the limits of the state of Pennsylvania, or created by, or existing under the laws of any other state or states. Among the various acts of the legislature of the state of Pennsylvania, giving powers as aforesaid, these defendants refer to two acts, exemplified copies of which are hereunto annexed—"An act to authorize railroad companies to lease or become lessees, and to make contracts with other railroad companies, corporations, and parties." Approved February 17th, 1870. "An act relating to leases or contracts for the use of canals or other navigation works by railroad companies," approved May 3d, 1871.

And the defendants have hereunto annexed exemplified copies of such acts of the legislature of Pennsylvania, of a public and general charter, which give authority to railroad companies in that state, to merge or consolidate with other railroad companies, both in and out of the state of Pennsylvania, to which reference is made.

The defendants draw attention to the said legislation of the state of Pennsylvania, in connection with the said act of the legislature of the state of New Jersey, approved March 17th, 1870, entitled "An act to enable the United Railway and Canal Companies to consolidate their stock, and to consolidate or connect with other companies," as giving evidence of a very important state of facts in the history of the internal commerce of this widely extended country, so largely carried on by means of railroads and canals, in and over

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the states by which such railroads and canals were authorized to be constructed, connecting with the railroads and canals in adjoining states, the construction of which has been authorized by like authority; thus making continuous lines of travel and transportation over and beyond state boundaries, to meet the emergencies of business, and also serving to keep united under one government a great and enterprising people.

As to the dangers from a foreign corporation, which haunt the imaginations of the complainants, the defendants submit the fact that, of the 189,904 shares which compose the stock of the United Companies, less than one-fourth is owned by residents of the state of New Jersey, and the residue are owned by persons residing out of the state of New Jersey. They charge, that of all the funded indebtedness of the United Companies, or either of them, less than one-quarter in amount and value are held by people residing in New Jersey; that a large part of their bonds are sterling bonds, the interest whereof is paid in Europe, and the holders of which reside in Europe.

It avers, that the exhibition of the said bill of complaint, by which the complainants object to the resolutions of the board of directors of the United Companies, and to the proceedings of the said board, touching the negotiations for the said lease, and the purpose of the said board to cause the said lease to be executed and delivered, came too late. Since the said act of March 17th, 1870, in the said bill set forth, the subject of making a lease in pursuance of the powers thereby conferred, by the United Companies to the Pennsylvania Railroad Company, has been a matter of notoriety and public discussion, and has attracted and received the attention of the stockholders and directors of the said companies, and the complainants have laid quietly by, and taken no steps in this honorable court relative thereto, until the said negotiations were closed, and the said lease was prepared, and the said resolutions were passed. That the same should be executed and delivered when the conditions

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of the said act should be complied with, as in the said resolutions set forth.

It insists, that the said corporations composing the United Companies of the state of New Jersey, lessors in the said indenture of lease, have good right and lawful authority to make, execute, and deliver the said indenture of lease, to the Pennsylvania Railroad Company aforesaid. That the Pennsylvania Railroad Company, have a good right and lawful authority to accept the said lease, and become the lessees, in manner and form as in the said lease has been prepared and agreed upon. That said complainants have no right to prevent the execution and delivery of the said lease, that they have no equitable standing in this honorable court to have an injunction issued according to the prayer of the said bill, or any other injunction restraining the execution and delivery of the said lease.

The agreements referred to in the answer, and the acts of the legislature of Pennsylvania which were relied upon for authority for the Pennsylvania Railroad Company to take the lease, were annexed thereto.

An answer was also filed on the part of the defendant, George Richards, state director of the Camden and Amboy Railroad Company. The state was a large stockholder in the United Companies; and the answer of Mr. Richards was filed with the Attorney-General, that the state might be represented in the argument. This answer merely submitted certain legal propositions to the consideration of the court, neither admitting nor denying any of the allegations of the bill.

Upon the answers being read, *Mr. Browning* asked that a reasonable time might be allowed counsel to examine the answer of the companies. It contained matter of surprise. The cause should be fully heard.

Mr. Scudder opposed the request, on the ground that there was no new matter in the answer, and the counsel

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ould have come prepared to argue the case, on the denial
ing put in.

Hon. J. S. Black, (of Pennsylvania,) in reply, urged that
e answer was very voluminous, and counsel for complain-
ts ought not to be compelled to go on with the argument,
so important a case, without having an opportunity to
amine it more particularly, and with care, and asked that
ey might be allowed a week for that purpose.

THE CHANCELLOR.

When the rule to show cause in this case was granted, an
unusual length of time was allowed, and I then mentioned
to the counsel of the complainants, that I would expect them
to be ready, to-day, to proceed with the cause. The time
has been sufficient to prepare, on the side of the complain-
ants, unless the answer of the defendants put the matter in
an entirely new and different light. The answer of the
defendants, as read, is long, not much longer than the bill;
but the great part of that answer is made up of admission of
the facts charged in the bill—admitted shortly, it is true,
not spun out to a great length; but each separate fact, each
separate act, each separate organization, the acceptance and
approval of each act of the legislature is, distinctly admitted
by itself. I noticed carefully the reading of the answer, and
there appeared to me to be few or no new facts. One, two,
or perhaps three of the facts charged by the complainants
in the bill, are denied. One, that appeared to me, upon the
original reading of the bill, to be important, and does now,
was, whether there was a connection between the roads in
question and the Pennsylvania Railroad. A large part of
the answer is taken, in denying—not a mere simple denial,
(which would have been of no avail in such a case,) but
denying, (by setting forth the facts,)—the allegation in the
bill, that there was no connection, between the Pennsylvania
Railroad, the proposed lessee, and the united roads. An-
other part of the answer denies the fact stated of the

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expected income of the roads, under their present management and organization. The bill states that they might make fifteen per cent. under good management, as at present organized. Another long part of the answer is denying that fact.

Counsel have not pointed out to me any matter in the answer, that is new, any matter that changes the case, as they may be supposed to have come prepared for arguing it. Counsel, in preparing for arguing a cause like this, do not come expecting that the defendant will admit everything that is charged against him. These matters are matters responsive to the bill. Counsel ought to have come prepared upon their being denied, to contest the case, upon a denial being put in.

In these injunction cases, the remarks of the opening counsel are very sensible, and addressed to the discretion of the court, which ought to be exercised in favor of a full hearing of all parts of the case; and, though I do not see what the surprise is, though I do not see what, in the answer, is to change the case, from its position as originally presented for the allowance of the rule to show cause, I am willing to accede to so reasonable a request as counsel have made, for an adjournment over until next Wednesday, that they may read this answer and consider it; because, although I have failed to see in it, by the reading, and counsel seem to have failed to see in it, anything that is new or unexpected, or that should change the position of the case, (or at least have not pointed it out to me, therefore, I presume have not seen it,) it may be that, on a careful perusal of this answer, counsel may see something different in it. And one week longer cannot seriously incommode the defendants. The rule, as it now exists, if I merely adjourn the case, will prevent the execution or consummation of the lease. It may be important to the corporations, defendants, if they are to execute the lease, that it be done soon. If it is so beneficial as they set out in their answer, to the stockholders, the sooner it is done, probably the better, and I am unwilling

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delay them in what they consider—whether I consider it so or not—a matter important to have finished; but I think the week's delay asked by counsel, is not unreasonable. If the time, therefore, will suit the counsel on the other side, or, at least, is not incompatible with their engagements, I will adjourn the cause till next Wednesday.

Owing to the illness of the Chancellor, the case was postponed till the 12th of September, when the argument was had upon the rule to show cause, on the bill, answers, and affidavits annexed thereto.

Mr. V. L. Bradford, (of Philadelphia,) for complainants.

I. The companies named as lessors in the proposed lease, severally or collectively, prior to March 17th, 1870, did not possess any franchise or power to make or execute any lease of their canal and railroads, with their appurtenances, and of all their property and interest, real, personal, and mixed, for the purpose and object contemplated in said lease.

II. That said companies do not now possess, nor have they at any time since March 16th, 1870, possessed, severally or collectively, any franchise, privilege, or power to make and execute said lease, or any similar lease.

It is alleged, by the defendants, or some of them, that, on the 17th of March, 1870, the legislature of New Jersey, by an act approved on that day, conferred on said companies a franchise, privilege, or power to make and execute the said lease.

The complainants deny this allegation; because,

1. The title, preamble, and enacting clauses of said act demonstrate that its proposed application to said lease is an entire perversion of it.

It is a safe and reasonable canon of judicial interpretation and construction of a statute, that, if its language and spirit are fully satisfied by a different construction, or on a different hypothesis, than the one contended for, such latter con-

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struction is excluded and inadmissible, for, "*expressio unius est exclusio alterius*."

2. Said act does not authorize or sanction a lease, of the franchises, or of any of the franchises of the United Companies, or either of them, in any way or manner, expressly or by legal implication, to "the Pennsylvania Railroad Company."

That company is not named in said statute; nor, is a lease to "the Pennsylvania Railroad Company," indirectly authorized or sanctioned by the language of said enactment. The *works* of that company are not, "in connection or continuity" with the *works* of "the United Companies of New Jersey." They do not form "continuous and connected line" with the works of the United Companies of New Jersey. The *works* of three distinct and independent corporations—to wit, of "the Trenton Delaware Bridge Company," (partly a New Jersey corporation and partly a Pennsylvania corporation), of "the Philadelphia and Trenton Railroad Company," and of "the Connecting Railway Company," (both Pennsylvania corporations) lie between the works of "the United Companies of New Jersey," and those of "the Pennsylvania Railroad Company," and separate them, by an interval of at least thirty-one miles. How, then, can "the continuity or connection" required by the statute, be said to exist between the works of "the United Companies of New Jersey," and those of "the Pennsylvania Railroad Company," respectively?

Again: the statute refers to railroad companies in the state of New Jersey, "or otherwise." The word "otherwise" is not an adverb of place or situation. It here has not the meaning of the words, "otherwhere," or "elsewhere," which are synonymous words. Lexicographers agree, that no such meaning attaches to the word "otherwise," which signifies "in a different manner," "by other causes," "in other respects." It is used, with such signification, in a subsequent part of the same act. Substitute such correlative renderings, or such significations, of "otherwise," and

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y are wholly inapplicable, without meaning, and, in legal lance, are insensible, here. If so, that word is not to be arded, as it appears, in this part of the statute. This tion of the statute must be read without it. If the islature had intended to authorize a lease, between "the ited Companies of New Jersey" and a foreign corpo- ion, they should have either expressly named such corpo- ion, or, have used the word "elsewhere," or, the word therwhere," in the connection, in which the insensible rd, "otherwise," appears. It is not in the rightful power any court, to supply language not used by the legislature, ept where, of logical necessity, such language is implied m the context. To erase the word "otherwise," and sub- ute the word "elsewhere," or, the word "otherwhere," uld be to make law, and not to expound it. To convert e word "otherwise" into the word "otherwhere," or, the rd "elsewhere," would simply be, to furnish a new idea, d not a mere verbal correction. No one can contend, at a judicial tribunal can do this and thus legislate. To ak of "companies in New Jersey, or in a different nner," or, "by other causes," or, "in other respects," is t the same as to say, "in New Jersey, or in another te," "elsewhere," or, "otherwhere;" but, such an expres- n, in such connections, is without meaning, insensible, l to be wholly disregarded in reading and expounding d act.

3. The said act of March 17th, 1870, does not authorize a nt or *transfer*, by lease or otherwise, of *all* the property l estate, real, personal, and mixed, and, of *all* the fran- ses appurtenant thereto, of the United Canal and Railroad mpanies of New Jersey, such as is proposed by the said se, to any other company, domestic or foreign.

4. The said act of March 17th, 1870, has never been epted, by either of the several corporations sometimes led "the United Canal and Railway Companies," named the said act as the recipients of the proffered grant of ditional or supplemental corporate franchises and powers. The said act purports, "to enable" the said companies,

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and to grant to, confer, and bestow on them, severally and collectively, the additional and supplemental franchises and powers set forth in said act, which they did not, in whole or in part, previously possess. The said act is, therefore, in legal contemplation, a proffered supplement to the several acts of incorporation of the aforementioned respective companies; is, *pro tanto*, a new act of incorporation, i. e., it proffers new and further terms of contract to the said corporation. Said act must, therefore, be clearly, distinctly, and formally *accepted*, before it can form any part or portion of the several charters of the aforementioned respective companies, or bind, as a new, further, and additional contract, either the state, the said several corporations, or their several and respective stockholders. An acceptance of the proposed lease in the manner mentioned in said act, is in no just sense an acceptance of said act by the stockholders of either of the corporations who are named in said act, or in said lease. To validate said act, an *acceptance, by all the* stockholders, in a duly convened corporate meeting of each of the companies whose respective charters are affected by said act, is absolutely indispensable. In reference to a proper acceptance of said act, the mode adopted by the board of directors of the United Companies of New Jersey, to obtain the assent of the stockholders of the several companies, *impliedly* to said act, by the appointment of a committee "to obtain the consent of the stockholders to said lease," and to effect an execution of said lease, is illegal, inequitable, inappropriate, and unconstitutional. The aforementioned action of the said united board is manifestly a breach of trust by trustees, by means of a combination to effect a surrender and extinguishment of their trust, in disregard of the good faith and fidelity which they owe to the people of New Jersey, and to the stockholders and bondholders of the United Companies of New Jersey.

5. The said act of March 17th, 1870, does not authorize said lease, because it is an unconstitutional and void act. ~~It~~ ^{is} invalid and unconstitutional; because,

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st. It authorizes, (where a single stockholder is unwilling to accept it, in the case of such stockholder,) a divestiture of vested rights, "an impairment of the obligations of contracts," and such a change or alteration of private property tantamount to "a taking of such private property" for a private use, and not for a public use."

2d. The only provision made, in said act, for compensating the dissatisfied stockholders for the taking of their property, is, that "its value shall be assessed, as of the time immediately before the taking, but that the assessment thereof shall not be made and compensation paid until *after* the taking."

3d. The Constitution of New Jersey expressly requires, that compensation shall be *first* made. See *Const. N. J., Art. IV, Clause 9.*

4th. In requiring the dissatisfied stockholders to give up their shares of stock, and equitable corporate franchises and rights belonging to them, as *cestui que trusts* or beneficiaries of said corporations, (to wit, among others, the right, electing directors to manage the business of said railroads and canal, and the right to participate in a division of net earnings or profits of said business, in the ratio of stock held by each of them, as evidenced by certificates for said shares of stock,) in order to enable said corporations to carry into execution, any agreement, contract, lease, or other arrangement which they may deem it expedient to make, with any of the other companies mentioned in the 1st section of said act; the act delegates, or attempts to delegate, to said United Companies, the right to decide (in their own case) what constitutes "a public use," sufficient to justify the taking of private property," which right can only be exercised by the legislature itself.

5th. The said canal and feeder, and the said railroads and the said United Companies, with their necessary and proper appendages and appurtenances, respectively, are "public highways," within the state of New Jersey, and it is competent for the legislature of New Jersey, directly

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or indirectly, to assign or transfer, or to authorize an assignment or transfer of the highways, or the control of the highways of New Jersey, to a *foreign* corporation.

III. The lessee named in the proposed lease, "the Pennsylvania Railroad Company," possesses no power or franchise to become lessee in the said lease.

It is a legal presumption, until the contrary is shown, that "the Pennsylvania Railroad Company" possess no power or franchise to become the lessee of all the canal, railroad franchises, and *other property*, real, personal, and mixed, of the lessors, (corporations of the state of New Jersey,) as mentioned in the said lease, for the reason that the said "Pennsylvania Railroad Company" is a foreign corporation having its exclusive residence and field of corporate action on the soil of Pennsylvania, and possessed of a corporate life and existence derived, solely, from the commonwealth of Pennsylvania, which, as respects the present question of corporate franchises and property, is as foreign to the sovereignty of New Jersey, as that of any distinct and independent government in christendom. The Pennsylvania Railroad Company is, legally speaking, an artificial person, *inhabitant and citizen* of the commonwealth of Pennsylvania.

The counsel here examined successively, and at length, the different statutes of the state of Pennsylvania, to show that they conferred no power or authority on the Pennsylvania Railroad Company to take the lease.

IV. The said lease, or any such lease, is a violation of the laws and Constitution of New Jersey.

V. The said lease, or any similar lease, will, if executed and carried into effect, be contrary to equity and good conscience, and tend to the manifest wrong and injury of the complainants.

The unconscionable and inequitable features of said lease

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1. The rent or dividend of ten per cent. per annum, stipulated for, is a wholly inadequate return or compensation for transfer of the valuable and highly remunerative works and franchises of the lessors to the lessee. The average of net profits for thirty-eight years, from 1832 to 1870 inclusive, the whole period of the existence of the companies, was twelve and twenty hundredths per cent. per annum. There can be no reasonable moral doubt, that henceforth the companies will be able to earn net profits equivalent, at the least, to fifteen per cent. per annum.

2. The covenant and guarantee of the Pennsylvania Railroad Company to pay a rent equivalent to a dividend of ten per cent. per annum, on the capital stock of the lessors, for one hundred and ninety-nine years, is not safe or reliable, to the extent of a substitution of said guarantee for the valuable real, personal, and mixed estate of the lessors, transferred to said Pennsylvania Railroad Company by the proposed lease. The said lease violates the good faith of the incorporators of the lessors to their mortgage bondholders whose moneys have paid for nearly half the cost of the works of said companies. Those bondholders contracted directly with their obligors, the United Companies, who are crippled by this lease of the means of fulfilling, in a direct and immediate manner, their respective obligations. If the lessee shall, by mismanagement, either wilful or accidental, be unable to protect the obligations of said companies, they and their creditors may be remitted to expensive proceedings in equity, in a foreign jurisdiction, against the lessee, as their immediate remedy. The United Companies and the guaranteed return or quasi rent, will also be liable for any tort committed on their works, or in connection with them, by the lessee, in a common law action. They cannot relieve themselves by such lease from their corporate obligations and liabilities to the public.

3. The proposed lease is one-sided, and affords very little security to the stockholders of the companies, lessors. It is mainly made in the interest of the Pennsylvania Railroad

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Company. It is fair in seeming and false in meaning. "I keeps the word of promise to the ear, and breaks it to the hope." To verify these assertions, reference is made to the lease itself, and especially to the complete severance of the works and franchises of "the Philadelphia and Trenton Railroad Company," from the fortunes and interests of its affiliated companies, the United Companies of New Jersey affected by it. The Philadelphia and Trenton Railroad Company, with its connecting railway, is an essential part of the main trunk line between Philadelphia and New York. So highly has a close association with it been regarded by the New Jersey companies, that they, in the names of trustees, purchased and now own a considerable majority of its stock. Nevertheless, the aforementioned influential stock interest in the Philadelphia and Trenton Railroad, is assigned and transferred, by the proposed lease, to the Pennsylvania Railroad Company, so that the latter company can next January, elect every director and officer of "the Philadelphia and Trenton Railroad Company," and then, with the consequent consent of said company, can, at no distant day, merge it into their own corporation, as may suit themselves. In that way, if not in some other way, the lease enables the lessee to sever and annul the security afforded by the business, works, and franchises of "the Philadelphia and Trenton Railroad Company," now and heretofore closely connected with those of the United Companies of New Jersey, to the stockholders of all the companies.

4. The proposed lease provides that the lessors "shall furnish, when required, to the lessee, marketable certificates of new stock of the United Companies of New Jersey, to the amount of \$2,250,000, and also \$3,000,000 of the consolidated first mortgage six per cent. coupon bonds, free of tax, of the said United Companies, to be used by the lessee in making certain stipulated improvements at Harsimus cove, and elsewhere." What is this but watering the stock and increasing the debt of the United Companies of New Jersey? It is paying for improvements for the almost exclusive use of

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advantage of the lessee, without corresponding security to the lessors; because, in case of the bankruptcy of the lessee, but little use can be had or benefit derived to the United Companies in the transaction of their own proper and legal business, from the contemplated large outlay, by the lessee, at "Harsimus cove," even admitting that by a "re-entry," the said United Companies can ever regain possession of the properties leased by them "as of their former estate therein." It ought to have been stipulated in said lease that such expenditure and improvement, with a view of increasing the security of the lessors, (because the usufruct of the lessee is to be for nine hundred and ninety-nine years,) should be made by the lessee at its own proper charge and cost.

5. The proposed lease assigns and transfers to the lessee the absolute possession, control, and disposal of the vast amount of saleable real and personal property of the lessors, which the lessee will have in its power to use and apply, according to its numerous and varied necessities, and at its own option.

6. The alleged remedy of "a re-entry," provided in and by the lease "for covenants broken," affords no security. It is an illusory and ineffectual remedy. It is, indeed, no remedy whatever. There can be no "re-entry" on public franchises and property appurtenant thereto. The canal and railroads of the lessors are "public highways," "rights of way" common to every citizen, on which every citizen has a right of going, and on which there can be no private entry, nor any "re-entry" for covenants broken. The lessors cannot maintain ejectment for their railroads and canal, or for the necessary appurtenances or appendages thereto, which are exempt from taxation, such as stations and depots. They can only have such remedies as are appropriate to their vindication of "a right" to a franchise or to an incorporeal hereditament, such as a "right of way." What remedy can the stockholders of said companies have, other than a bill in equity, against the lessee, in case of a failure to pay the rent stipulated or non-performance of any other

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covenant contained in the proposed lease? There is no such "privity of contract" between individual stockholders and the lessee as to entitle them to a common law remedy, such as an action of covenant, debt, or *indebitatus assumpsit*. Their supposed right of "re-entry," and of re-vesting of their former position, in relation to their canal, railroads, and business as common carriers, is fallacious, impracticable, and valueless.

7. The proposed lease for the long term of nine hundred and ninety-nine years, by legal presumption, is taken out of and from an interest of greater duration, capable of sustaining a quasi reversion, and must, therefore, rest on the certain continuance of that larger interest beyond the term of such lease. If such quasi reversionary interest is dependent on circumstances, if a continuance of its supporting franchise is uncertain, or if it may be defeated by a condition, such lease, together with its annual return, in a quasi rent, to wit, the guaranteed dividends, will fall with such cessation, discontinuance, or defeasance, and the lessee, moreover, will have good cause of action for a disturbance, and a claim for pecuniary damages against said lessors. Now it is well known that the state of New Jersey has attached a condition to its grant of franchise to the United Companies, respectively, viz. that the state may take the works of said companies in 1889, on a just valuation. If the state should so do, either at the suggestion of the lessee, its successors or assigns, or of its own motion, in 1889, it may be inquired, who will have the right to receive, from the state, the pecuniary consideration for such assumption? Clearly, so far as its leaseholders of nine hundred and ninety-nine years (which may be, practically, regarded as almost equivalent to the whole interest) is involved, the lessee will be entitled to a very large compensation for a deprivation of the usufruct, for a very long period, of a most valuable and remunerative property. What will be the appraised value, as respects the stockholders, of a quasi reversionary interest, after the expiration of nine hundred and ninety-nine years? and what

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would be the proportion payable to them of the amount to be paid by the state? What then will become of the quasi security afforded by the usufruct of the leased property, for the payment of the annual dividend of ten per cent., by the said lessee to the said stockholders? and what then will be the right of the stockholders to claim, from the lessee, such dividends, by way of quasi rent or return?

VI. The complainants, by reason of such manifest wrong and injury, are without adequate remedy, other than the protection by the preventive writ of injunction prayed for in the bill, and are, under and by virtue of the Constitution of the United States, the Constitution of the state of New Jersey, and the laws of New Jersey, entitled to the protection afforded by said writ of injunction.

Mr. Bradford discussed these propositions in a long and elaborate argument, and cited many authorities in their support.

Mr. J. P. Stockton, for defendants.

The bill is bad on account of the omission of necessary parties.

The rule is, that the rights of all persons whose interests are immediately connected with the decision, and affected by it, shall be provided for, as far as they reasonably may be.

The Philadelphia and Trenton Railroad Company, and the Pennsylvania Railroad Company, are both necessary parties. Their interests are immediately connected with the decision.

The general rule is, that all persons legally or beneficially interested in the subject-matter of a suit should be made parties; or, if the expression be deemed more exact and satisfactory, that all persons interested in the object of the bill are necessary and proper parties. All the exceptions to the rule are founded upon public convenience and policy, and courts of equity never permit any exception, unless they

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can dispose of the merits of the case before them without prejudice to the rights and interests of other persons who are not parties. If complete justice cannot be done without others being made parties, whose rights or interests will be prejudiced by a decree, then the court will altogether stay its proceedings, even though these other parties cannot be brought before the court: for in such cases the court will not, by its endeavor to do justice between the parties before it, risk the doing of positive injustice to other parties not before it whose claims are or may be equally meritorious. *Story's Eq. Pl.*, § 77, and cases cited: *Hallet v. Hallet*, 2 Paige 15.

The *object* of the bill is shown in the prayer to restrain the parties, that is, the New Jersey companies and their directors, from executing a lease, of which the Philadelphia and Trenton Railroad Company is one of the lessors, and of which the Pennsylvania Railroad Company is the lessee; a lease the three lessors and parties to which are declared by the acts set out in the bill to be identical in interest with the Philadelphia and Trenton Railroad Company.

The *object* of the bill is further "to restrain the consolidation of the capital stocks of the United Companies, and the Pennsylvania Railroad Company;" and this, although the bill sets out the act of the legislature authorizing it, and expressly consolidating it with the Philadelphia and Trenton Railroad Company *by name*. So the act is declared *invalid* for want of acceptance, and *unconstitutional*, and the court is asked to declare this without an effort being made to get the party *the most interested* before the court.

The bill sets out the making of the lease, showing the Philadelphia and Trenton Railroad Company to be one of the four lessors. It recites the resolution of the boards of all four companies *adopting* the lease.

The principle at the foundation of the question of who are necessary parties, is a principle admitted in all courts, upon questions affecting the suitor's person and liberty, as well as his property, namely, that the rights of no man shall be

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aided without giving him an opportunity to be heard.
Story's Eq. Pl., § 72.

Is it alleged that the parties are out of the jurisdiction of the court, and cannot be reached by process? It is a well known rule, in such a case, that the bill should not only allege that the person is out of the jurisdiction, but it should also pray process against him, so that he may be made amenable to the process of the court, should he come within the jurisdiction. One reason for this is, that the absent person may have an opportunity of appearing to the suit and taking such a course in it as he may deem to be for his advantage. *Munoz v. De Tastet*, in note to *Brookes v. Burt*, 3 Bear. 109.

When the party is out of the jurisdiction, it should be affirmatively averred in the bill, and not left to mere inference. *Wald v. Nunn*, 5 Sim. 405. There is no such averment in this bill. The general rule is, that to a bill against a partnership, all the partners must be made parties. But if one of the partners be resident in a foreign country, so that he cannot be brought before the court, and *the fact is so charged in the bill*, the court will ordinarily proceed to make a decree against the partners who are within the jurisdiction; with this qualification, however, *that it can be done without manifest injustice to the absent partner*. *Story's Eq. Pl.*, § 3, and cases cited. But the excuse for a non-joinder of parties, that they are out of the jurisdiction, ought not to prevail where important rights of the absent partners are involved. *Vose v. Philbrook*, 3 Story 347.

The United Companies of New Jersey, and the Philadelphia and Trenton Railroad Company, under the agreements between them, have been held to be partners. They have a community of interest. In the cases arising out of the accident at Burlington, the facts were set out in affidavits showing the relations of the companies to be a partnership, and a case removed to the United States courts on that assumption.

But since the coming in of the answer, this matter is

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established beyond doubt. The answer sets out the fact that on the 22d day of April, 1836, an agreement was made between the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad and Transportation Company, of the one part, and the Philadelphia and Trenton Railroad Company, of the other part, by which agreement the said partners did agree, each with the other, that from and after the 1st day of June then next ensuing, during and until the expiration of their said charters, respectively, *the clear profits arising from the stock of said companies should be divided among all the stockholders of the said several companies, share and share alike.*

By the contract itself, it further appears that it is provided therein that the stock of the said companies, respectively, shall be paid up in full, and that the accounts of the said companies *shall be kept separate*, and the dividends of the clear profits thereof shall be made and declared separately in the same manner as if this agreement had not been made.

The company is an independent organization, treated as such in the contract, and so spoken of in the act of 1870, but the community of interest existing will, if the lease should prevent the making of fifteen per cent. dividends, be the same loss to the corporators of the Philadelphia and Trenton Railroad Company, as to those of the three defendant companies. If the securing of ten per cent. for nine hundred and ninety-nine years is a valuable addition to the stock of the defendant companies, it is of precisely the same value to the stock of the Philadelphia and Trenton Railroad Company.

The Philadelphia and Trenton Railroad Company, and "The Joint the Delaware and Raritan Canal, and the Camden and Amboy Railroad and Transportation Companies," as the act of 1870 recites, have an identity of interest.

The lease must be executed by them as a separate company. They might be obliged to perform it specifically, if the courts of Pennsylvania were appealed to? If so, would

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it be pretended that such a decree would be made in Pennsylvania without making parties of these defendant corporations?

It has been recently held by a distinguished equity judge, Vice-Chancellor Wood, that when a bill was filed by a stockholder, on behalf of himself and all other stockholders, against the chairman, directors, and secretary of a railway company, to restrain them from acting on an agreement dated some years before, and entered into between the company and six other railway companies, for the general regulation and assimilation of the traffic tolls on the several railways, as being *ultra vires*, and to the damage of the company and its members, *that the six other companies ought to have been made parties to the bill.* *Hare v. Northwestern Railway Company*, 3 *Law Times*, N. S., 289.

See also *Godifroi & Shortt on Railways* 79; *Salomons v. Laing*, 12 *Beav.* 377; *Bryson v. The Warwick Canal Company*, 4 *De G., M. & G.* 711.

The Philadelphia and Trenton Railroad and the Pennsylvania Railroad Companies, have a recognized existence in the state of New Jersey. They may sue and be sued, and yet that is a power derived only from their charter. 25 *Vermont* 433.

Corporations may legally contract in other states than those which charter them. *Bank of Augusta v. Earle*, 13 *Peters* 591; *Story on Confl. of Laws* 37; *United States v. Amedy*, 11 *Wheat.* 412; *Beaston v. The Farmers' Bank of Delaware*, 12 *Peters* 136; *Angell & Ames on Corp.*, §§ 272, 273; *Daniell's Ch. Pr.* 134; *Nix. Dig.* 173.

They may hold lands in another state. *Dry Dock v. Hicks*, 5 *McLean* 111.

But the Philadelphia and Trenton Railroad is within the jurisdiction, and could be served with process. Since the passage of the act of 1870, it is naturalized in New Jersey, and process can be served upon her, as upon all other citizens. It is not pretended otherwise by the bill.

The connecting roads chartered by different states, are

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not to one another and the other states as foreigners by the English law. It has even been suggested in the cases, that they are citizens by the Constitution of the United States.

But has the Pennsylvania Railroad Company, to which I have only incidentally alluded, any interest in the object of this suit? Do the facts in the bill show that, even if the bill was in proper form, and averred directly that that company was out of the jurisdiction, it is a case where the court will go on in the absence of a party in interest? Are not important rights of the Pennsylvania Railroad Company involved? Does not the court run great risk of doing injustice, by going on without an effort having been made to get them into court—without putting the case in such a position that they can come in and show their interest? Is it not a case where the court will stop, rather than run the risk of doing injustice?

The *object* of the bill is to prevent the execution of a contract *already made* and directed to be executed by the United Companies in connection with the Philadelphia and Trenton Railroad Company, as lessors of property they aver to be worth \$50,000,000. The Pennsylvania Railroad Company are charged to be incapable of receiving it, the act declared not to authorize it, and yet *they* are not made parties, and cannot come in, and show the fact that they have full and ample authority from the state of Pennsylvania, under which they have made similar leases which the courts have approved. In other words, if this court will deny the party most interested the right of appearing and showing the power they have, then a decree may be had, preventing those who contracted with them from executing a contract *already made* by virtue of an act of the legislature of the state. In such a case, a preliminary injunction has never before been granted.

So far from the Pennsylvania Railroad Company not being a necessary party, it would seem as if they are purpose not made defendants, to prevent their coming in and showing their power.

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In the case of *Gratz v. The Pennsylvania R. Co.*, and *Phila. & Erie R. Co.*, 41 *Penn. St.* 447, where both contracting companies, in a similar case, were made parties, it appeared that the Pennsylvania Railroad Company being about to purchase the rolling-stock and bonds of the Sunbury and Erie Railroad Company, and to lease it for the term of nine hundred and ninety-nine years, a bill in equity was filed by a stockholder for a preliminary injunction against the proposed purchase and lease: Held, "that the intended contracts were valid because within the corporate powers of the two companies under the acts of Assembly of April 13th, 1860, and April 23d, 1861. This is what they are not permitted to show. This is why one of the contracting parties is not made a party to the bill, the object of which is to prevent the execution of an indenture of lease, which, by virtue of an act of the state which has been in force for more than a year, has been adopted and ordered executed by the parties defendant.

Suppose the Pennsylvania Railroad Company, having a perfect right to sue here, should apply to the United States court, or to this court, for a specific performance, and insist, after a vote of two-thirds, that the company be compelled to execute the lease, would the court refuse to consider that that should be done which was agreed to be done by both parties, *and ordered to be done*? Yet, for the first time in the history of equity, this court would find itself in a position where they refused to hear the authority and power claimed, and its source, because they proceeded to adjudicate, with the main party in interest no party to the suit. They act without hearing the parties interested.

If these are foreign corporations, which I insist they are not in the sense used in the English books, even by the strict rules that apply to partnerships—omitting the fact that these corporations have duties to the public at large outside of their relations to their stockholders—I insist that the excuse for non-joinder, cannot prevail where not only important rights of absent partners are involved, but the

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only party interested on one side in the contract executed between lessors and a lessee, and the fulfillment of which it is sought to restrain, is not a party to the bill. *Story's Eq. Pl.*, § 78.

If the Pennsylvania Railroad Company, and the Philadelphia and Trenton Railroad Company are not interested in the *object* of the bill, then neither are these complainants nor the defendants. If they are, the court must stop until proper parties are joined, and the injunction must be dissolved. *Story's Eq. Pl.*, § 77, and cases.

Can it be gravely insisted in a court of equity that after the lease was adopted and ordered to be executed by the officers on the occurrence of a certain event, that after the performance of the condition which made the order absolute, the companies lessors and individual directors can be restrained from fulfilling the contract, when it is clear that the act was within the legitimate exercise of the powers which had been granted, *on the ground that the company's lessees have not the power to accept the lease*, without making a party of that company the doubt of whose power is the ground of the relief sought?

Can it be possible for a court to listen to an argument and examine the statutes of Pennsylvania to ascertain whether the Pennsylvania Railroad Company are empowered to lease other railroads, when they are not made parties to the bill, and have not the power to show their authority, and when and where obtained?

In the case of *Mott v. The Pennsylvania Railroad Company*, the powers of the Pennsylvania Railroad Company, under the act of April 13th, 1860, and April 23d, 1861, were construed by the court at the instance of a dissentient stockholder. The decision was in favor of the power of the company. Now suppose, without making parties of them in this case, the prayer of the bill was granted because the court here took a narrower view of the powers conferred by that act, are you not doing great injustice to the absent? Might they not to be permitted to show how their courts

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had interpreted their acts? You cannot rely upon the defendant companies doing it. They may regret the act they have done. They may be willing to have the contract declared void for want of power to make such a contract on the part of the Pennsylvania Railroad Company. It will not do to leave the Pennsylvania Railroad Company's interest to the mercy of those with whom they are treating for peace.

This is not only a preliminary question, but it is a fundamental question, which should control the whole argument and the extent of the examination which the court will permit in this case.

By not making the Pennsylvania Railroad Company parties, complainants are estopped from denying their power. If it appears that defendants are acting within the scope of their authority, if the acts complained of are no violation of their organic law, the dissentient stockholder has no place in court, no right to examine into the wisdom of the exercise of the discretion vested in the directors and controlled by a majority in interest of the corporators. There is no charge of fraud in the bill; nothing to justify this court in undertaking to review the wisdom of the management of a corporation, whether they should make three or four per cent. dividend. Nor have the court any power whatever to ask whether a foreign corporation with which they have contracted is *ultra vires* in making that contract, or whether it is not. They and their powers, by the act of complainants, are placed outside of your jurisdiction.

The Pennsylvania Railroad Company are not here, and if defendants have the power and have exercised it, the case is at an end. I insist that if the court does permit this case to proceed, the examination is necessarily limited entirely to the question of whether the corporations defendant have exceeded *their* powers in ordering the contract to be executed. Before reaching this question, however, the court will stop if it finds the slightest cause for believing that complainants acquiesced. If it appears that they had knowledge of what was contemplated, and waited until the corporation had

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acted before seeking the aid of this court, the corporation cannot be enjoined at the prayer of complainants.

The individual cannot be enjoined, because all that remains to be done is to affix the seal, which is done by the president, in whose custody the law considers it; but the order of the board, by virtue of which it validates and executes the lease, is already made. There is no prayer to enjoin the president from affixing the seal when two-thirds of the stockholders have approved of the contract. It is his duty to do it, even though an injunction rested on the individuals composing the boards of directors of the three defendant companies. An injunction against the corporation may prevent any agent from doing any further act in the matter, but this simply proves that the prayer is too late as against the corporation, as they have exhausted their power and finished their work, leaving nothing but the simple act of obedience of an officer to the order of the board to be enjoined.

Had the lessors power to make the lease set out in the bill?

I claim that they had ample power under the act of 1870. That they had ample power, and it was their duty to do it, without any special enactment, if in their discretion it would enable them better to perform their duties to the public and render more valuable the interest of the stockholders.

To enable it to answer the purpose of its creation, every corporation aggregate has incidentally, at *common law*, a right to take, hold, and transmit property, and may dispose of any interest in the same, having the same power in this respect as an individual. Thus it may *lease*, grant in fee or tail, or for a term of lives, mortgage, and, though insolvent, assign in trust for the payment of debts. *A. & A. on Corp.*, ch. V, §§ 145, 191; *Featherstonhaugh v. Lee Moor Porcelain Co.*, *Law Rep.*, 1 *Eq.* 318; *Parish v. Wheeler*, 22 *N. Y.* 494; *Pennock v. Coe*, 23 *How.* 117.

There can be no doubt, the general principle of the majority to control the minority, in all the operations of the

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company, within the legitimate range of its organic law, is implied in the very fact of its creation, whether expressly conferred or not. It is incident to every business corporation to obtain such extension and enlargement of its corporate powers as the course of trade and enterprise and altered circumstances shall render necessary or desirable, not altogether inconsistent with its original creation. 1 *Redf. on Railw.*, pages 72, 73, § 20, *Clauses 3 and 8*; *Louis., Cin. & Charleston R. v. Letson*, 2 *How.* 497; *Ware v. The Grand Junction Water Works*, 1 *Russ. & My.* 470.

Hence, it is held that a court of equity will not, at the instance of a shareholder, restrain a joint stock incorporated company, whose acts of incorporation prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodeling of its constitution, or to a material extension and alteration of its objects and powers. 1 *Redf.* 74, § 9.

There was a time when the tendency of the courts was otherwise, and some few cases were decided which held the principle that the directors, and the majority of the company, may be restrained from employing money subscribed for one purpose for another, however advantageous; but the distinction in these cases, which exist between partnerships and joint-stock companies, unincorporated and unconnected with public duties, and those which had duties to the public constantly increasing, was entirely lost sight of. The duty imposed by the act of incorporation, under actual circumstances, and the demands of increased traffic, drives the corporation to demand increased powers, enlarged capital, new connections and agents, not contemplated in the original act. *Stevens v. The South Devon. Railw. Co.*, 13 *Beav.* 48; 1 *Redf. on Railw.* 75.

In the case of *Mott v. The Penn. R. Co.*, 30 *Penn. St.* 23, the brief of Cuyler, St. George Campbell and Stanton, states that no case can be found either in England or in this country, of a preliminary injunction being granted for re-

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straining a corporation from performing an act expressly authorized by legislative authority. This view was sustained by the court. It was held that a dissenting stockholder of the Pennsylvania Railroad Company cannot have a preliminary injunction to prevent the company from becoming the purchasers under the authority of the act; his rights could only be determined on final hearing.

Could these companies, at the instance of the owner of one share of stock, continue to run a horse railroad from Camden to Amboy, against the will of the legislature, and the majority of the stockholders?

While the wants of the community advanced, while new arteries of trade opened in every direction around, New Jersey, against the will of the legislature, against the commands of access to the national capital, could she stand gazing, like Joshua's moon on Ajalon? This can't be law, because law is common sense.

The charters of two of these companies, the Camden and Amboy Railroad and Transportation Company, and the Delaware and Raritan Canal Company, with all the subsequent acts to that time, underwent a searching examination in the Delaware Bay Railroad case.

As the grant secured to the companies the exclusive right between the cities, a question arose as to the meaning of the word "between;" whether it embraced local business which did not go through. Chancellor Green, in a very able opinion, examined the subject, and that opinion declared what the *undertaking* was and is. That opinion was confirmed by a unanimous vote of the Court of Appeals. The only two judges who dissented, if I am right in my recollection, did so on points of practice as to how far our reliance should go, the Court of Appeals going further than the Chancellor.

In this opinion, the Chancellor said: "The contract founded upon a valuable consideration, paid by the companies. It was made as an inducement to private enterprise at

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private capital, to construct an important highway required for public travel and the convenience of commerce, and which *it was incumbent upon the state in its sovereign capacity to provide*, either directly by its own means or through the agency of others."

Now, is it reasonable, can it be law, that as the public demands increased, as it became necessary to expend vast amounts of money to do the business which the public wants demanded, that while men talked of moving the national capital, because proper and continuous means of access across New Jersey were said to have been denied; while Congress maintained the right to break down all state rights, and ignore their boundaries, to force roads across the states for continuous communication, on account of its paramount necessity; that while it is a fact that cannot be denied that the existence of the nation was preserved, and its political unity secured, by bands of continuous iron rails, reaching from the Pacific to the Atlantic; that the law all the time was, and is now, that one stockholder could have defied the whole National Government, the state legislature, the public wants, the safety of the people, the supreme law? One share of stock could do all this, notwithstanding the fact that the charter authorized the Camden and Amboy Railroad Company "to exercise all the rights, powers, and privileges pertaining to corporate bodies, *and necessary to perfect an expeditious and complete line of communication from Philadelphia to New York, and to carry the object of this act into effect.*"

The case of Kean v. Johnston, was decided entirely on the construction of the act taken by the Master, he holding *that the act itself, in terms, required every stockholder to assent*. It is also a case of amalgamation, and so cited by Mr. Redfield on his work on Railways. Or rather, it was a case of entire dissolution, and embarkation in a new business, and so treated by the Master. I think I ought further to add that the case was settled by the parties, after an appeal to the Court of Appeals, and has no further weight as

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authority than the opinion, at that time, with the lights that then shone round him, of an able and eminent jurist.

But the application of legal principles which do not change to the ever new and changing circumstances that follow railways, is of much difficulty, and cases are decided differently in the different states and England; and courts never hesitate to correct a mistake in the dicta of the court or application of the law, as soon as subsequent cases or events show the error. In the early days of railway cars in this state, it was held by our Supreme Court, that if a cow trespassed upon the track the company should pay value. The law now holds the owner very properly responsible for his negligence, in endangering the lives of passengers, and causing great loss of property.

In *Zabriskie v. The Hackensack and New York Railroad Company*, 3 C. E. Green 178, corporators and private partners, are treated as precisely in the same position. On page 184, the Chancellor says the doctrine of *Natusch Irving* was adopted in New York by Chancellor Kent, the case of *Livingstone v. Lynch*, 4 Johnson's Ch. 573, and in this state by the decision of Parker, Master, in *Kean Johnston*, 1 Stockton 401, losing sight of the distinction made in *Mott v. The Pennsylvania Railroad Company* altogether. This case, however, was put on the ground that it was a new and different enterprise, and not within the power of the legislature to so alter the charter under the power to alter or repeal at pleasure. "The question here is, can this company, either with or without the consent of a majority in interest of its stockholders, compel the complainant to embark capital subscribed for the first enterprise in this new one, entirely different?" The Chancellor moreover adds, on page 193: "The company is authorized to construct another road; it is not compelled to do it. If it build it, or if it does not, its old charter remains, with its franchises and privileges intact, and no new burden except so far as it assumes them. This is in no sense of the word an alteration of the charter. It would be as absurd

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as to say, that an owner had altered his house who had built a larger one on an adjoining lot."

Now, the act of 1870 is in no sense an alteration of the charter. It is a grant of a privilege the legislature have a right to grant. It is no new burden on the company; it only confers a privilege, which they may exercise or not, as they choose. If the exercise of that privilege violates the law of corporations, that is, the contract between the stockholders, it cannot be done without the consent of all the shareholders.

The necessary changes in the management of business, to keep the business from being diverted from New Jersey, was the duty of the corporation to the stockholders, and to the state, and they had a right, and it was their duty, to apply to the legislature for increased powers, and this has been constantly done, until the capital has increased from one million to thirty-five millions. In addition, by and with the consent of the corporation, alterations have been made in the charter of a fundamental character, rendered necessary by the increased demands of the public.

These companies have made contracts and running arrangements for years, with agents in and outside of the state, which were necessary to make connections and satisfy the just demands of the public wants. They have their arrangements now with the Philadelphia and Wilmington Railroad Company, the Baltimore and Ohio, and Pennsylvania Railroad Company. In one sense this may be called *ultra vires*. It was only contemplated at the time that the city of Camden and the wharf at Amboy should be united; and selling through tickets to New Orleans and California was never dreamed of. These things not being illegal—not being prohibited—are to be considered a part of the original grant; they are the result of the exercise of the discretion of the directors, who represent the majority of stock, and as long as that is honest and does not violate the law, a court of equity will not interfere with it.

It is not *ultra vires*, because it is an exercise of a power,

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made necessary by a change of circumstances, to carry out the very object of the original charter. What would be *ultra vires* in this case, would be to fail in their duty to the public, to the state, and the stockholders, by letting the march of improvement pass them by, or annihilate them. And this subject is confided to the discretion of the directors, and not to the court. *Hodges on Railways*, 57, 58, 59.

The rule is, that the court will not interfere in matters which are properly the subject of internal regulation. See *Kerr on Injunctions*, 565; *Foss v. Harbottle*, 2 Hare 46; *Gregory v. Patchett*, 33 Bear. 595; *Charlton v. Newcastle*, 5 Jurist, N. S., 109; *Godifroi & Shortt on Railways*, 773, 74.

The suggestion that a stockholder has a right to hold the whole body, in spite of the direct power given by the legislature, to employing the funds to no purpose but that contemplated by the original corporators at the time of the first charter, as applied in some of the cases, is not applicable to public companies, or private companies with public duties. The attempt to apply it has already reduced the proposition to an absurdity.

Is the right derivative, or is it only the injured stockholder who has it? Then, are we to examine the date that each shareholder bought his stock, to ascertain what contract he had a right to insist upon? As one of the material alterations of the management of these companies has been the repeated issue of new stock, it is true, that if that class of power, when authorized by law, with the consent of the majority, is to be considered *ultra vires*, any stockholder could have kept the capital at the original sum of one million of dollars, and the corporation could have defied any improvement whatever in transit across this state. The whole matter controlled by one obstinate man with one share of stock. In fact, the constant re-iteration in the bill that the alterations became law by *acquiescence*, is a necessity, as they state themselves out of court by admitting that any

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the acts of the legislature were valid. And yet, whoever heard of the allegation of the performance of anything more than the condition precedent? In other words, the bill takes the position, and the draftsman found it necessary that every change from the original charter was made by "*acquiescence*." The connection with the New Jersey Railroad Company; building the Trenton branch; the marriage act; the building the Belvidere and Flemington roads; the consolidation with the New Jersey road; in some cases an alteration of the charter so fundamental that the assent of the corporation had to be filed; these are all *ultra vires*. And again, interfering with the relations of stockholders, to such an extent that the assent of a majority, or two-thirds, as the case may be, was required, as in the act to validate and confirm the consolidation with the New Jersey Railroad Company when a joint-stock was made. And at other times, conferring privileges which do not alter the relation, but which simply permit the company to exercise their discretion, with enlarged power to meet the public demands. All these are law only by acquiescence, and the legislature have been for more than forty years passing acts which were invalid—which did not become law by virtue of their own power, but by the laches of those interested.

None of the complainants are shown to be original stockholders in the Camden and Amboy Railroad, or Delaware and Raritan Canal.

None of the complainants were stockholders in the original undertaking of "perfecting an expeditious and complete line of communication from Philadelphia to New York." What are they doing here, asking to hold the majority to a contract to which they were no party—an *undertaking in which they never embarked*? If the right is derivative, at least the persons who were the original shareholders should have been named, and if they were not the party complainant, the assignment should have been set out so that it would appear on the face of the bill that complainants received their stock in accordance with law and the rules of the com-

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pany. Their title to sue as shareholders and hold the majority to a particular undertaking is not set forth at all. And by the affidavits it absolutely is made to appear affirmatively, that the title they have, good or bad, is of a different character and occurred at different dates, while nearly all the stock owned by them may be, and probably is, new stock created since the most important changes in the organic law of the companies. Yet it appears that John Black was a subscriber to the capital stock of the New Jersey Railroad Company. See 1 *Daniell's Ch. Pr.* 195; 1 *M. & K.* 61 = *Sayer v. Wagstaff*, 2 *Y. & Coll., Chan.* 230; *Ryan v. Anderson*, 3 *Madd.* 174.

They have no standing in court as dissentients to the charge of an original undertaking. The bill is demurrable on this ground, and, in addition, it would seem as if they made the bill multifarious, as though there was a mis-joinder as well as a non-joinder. They claim different and inconsistent equities. They claim no common interest, but claim to hold the majority to different and inconsistent contracts. *Van Sandau v. Moore*, 1 *Russell* 441; *Kean v. Johnston*, 1 *Stockt.* 414.

The English courts have in some instances, indeed, restrained railway companies from carrying contracts of leasing into effect without the authority of the legislature.

But such contracts being legal, and *not inconsistent with* the policy of the acts of Parliament, are to have a reasonable construction; and where, by the creating of new companies and other facilities, the business is very largely increased, the parties are still to abide by the fair construction of the original contract, as applicable to the altered circumstances. *East Lancashire R. v. The L. and Y. R.* 25 *E. L. & Eq.* 465; *Kerr on Inj.*, (Eng. ed., 1867) § 60 title "Leases and Working Arrangements."

In *Kean v. Johnston* the Master says, (page 410,): "*Ware v. The Grand Junction Water Company*, 1 *Russell & Mylne* 461, Lord Brougham, on the application of a single shareholder, restrained the corporation from embark

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ing their funds and credit in getting water by aqueduct from another river instead of the Thames, as originally contemplated. In *Cardiff v. the Manchester and Bolton Canal*, a corporation, on the application of a stockholder, was restrained from applying to Parliament for a change in their charter to enable them to convert a portion of their canal into a railway." Now, contrast this with the summary of the law in England to-day, as laid down by Mr. Redfield,—*Redfield on Railways*, page 592, ch. 22, § 1, cl. 6: "There is no doubt of the right of a railway in England to apply to the legislature for enlarged powers, even for the power to become amalgamated with other companies, so as to make one consolidated company. And contracts between the different companies for this purpose, have been there recognized and enforced in courts of equity." Citing *Mozly v. Alston*, 1 *Phillips* 790, where Lord Cottenham said: "There is scarce a railway in the kingdom that does not come to Parliament for extension of powers."

"And there seems," says Mr. Redfield, continuing, "to be no question made in the English courts of the power of Parliament to extend the line of a railway or to consolidate existing companies, and the shareholders are bound by the acceptance of such legislative provisions by a majority of the company, as by contracts to procure such powers by act of Parliament." *Great West. R. v. The Birm. and Oxford Junc. R.*, 5 *Railway Cas.* 184, 241; *Stevens v. The South Devon R.*, 2 *E. Law & Eq.* 138; *Great West. R. v. Rush-out*, 10 *E. Law & Eq.* 72; *Lauman v. The Penn. R. R. Co.*, 30 *Penn.* 42; *Godifroi & Shortt on Railways*, 82 and cases, and 72; *Hodges on Railways* (4th ed.) 71.

The Chancellor, in *Zabriskie v. The Hackensack Railroad Company*, 3 *C. E. Green* 189, says: "In New York a different rule has been established, and it is held, that the power to alter will authorize the company, by consent of the legislature, to extend its enterprise without the consent of stockholders." He cites a large number of New York cases to that effect, and adds, that the Supreme Court of Massa-

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achusetts, in *Durfee v. The Old Colony Railroad*, 5 Allen 230, had followed the New York rule. He also cites *Banc v. Alton and Sanga. R. Co.*, 13 Ill. 504; *The Pacific R. Co. v. Renshaw*, 18 Missouri 210; *The Pacific R. Co. v. Hughes*, 22 Missouri 291; to the effect that a majority of the stockholders, by the authority of the legislature, may make a change, provided it is not a great nor a radical one.

The Chancellor insists that the principle of these cases is wrong: that if the majority of the stockholders and the legislature can change the *object* of the enterprise in small things, there is no principle of law by which they can be restrained in any a little larger. This may be entirely true but the distinction we make is recognized in all the cases and authorities between a change of *object*, and a change of power and means to continue the same *object* which became necessary by increased demands. It is not necessary for us to hold that a banking company can abandon its business and make a railroad company of itself.

I recollect a case of deviation, in 9 *Harris*, where it was said that the deviation of a quarter of a mile for a forbidden or unauthorized purpose was illegal, but a deviation of ten miles from a proper necessity was justifiable. Now, in the case now before us, it is admitted that the *object* is the same; the *means* only are altered to suit altered circumstances.

Now, suppose the Chancellor is right, the new cases are in new light since the decision, have drawn the line clearly. An entire alteration, creating \$50,000,000 of stock where there was only \$3,000,000, is legal by authority of the legislature and a majority of the stockholders, provided it is needed by the increased public necessity to do the same character of business; the changes of channels and circumstances made by the rapid growth of the country and the exercise of a wise foresight as to the rivalry in their business being duly considered. Mr. Redfield, on page 199, treating of the fundamental alteration of charter, says: "And a alteration in the charter which consists only in the increase

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of the corporate powers, *as of a different organization of the corporate body*, leaving it with lawful power to execute what may be regarded as *substantially* the original object of its creation, will not exonerate subscribers to the original stock of the company." *Pacific Railway v. Hughes*, 22 Mo. 291; *Peoria & Oquawka R. v. Elting*, 17 Ill. R. 429.

It appears, then, that an alteration which leaves with the corporation lawful power to execute *substantially the original object of its creation*, is legal. 2 Stockt. 174.

Let us then pause before examining the cases further, and understand precisely what was the *original object of the undertaking* in this case. There is not much difference of opinion in the cases as to the law, but the difficulty arises on its application. What are *incidental* powers, is a new question in each case. What was the object of the creation is a question, also, for each case.

Fortunately for us in this case, we do not have to ask the court to decide the objects of our creation from *the words of our act of incorporation and subsequent alterations*. Clear as that object is in all of the legislation of the state, yet I claim that we are past the point when that question can be made in New Jersey. The Court of Appeals, by a unanimous vote, confirmed the construction given by Chancellor Green to the acts defining the objects of the creation of this defendant corporation. 1 C. E. Green 362; 3 Ibid. 546.

The exclusive privileges have, indeed, expired by the limitation of time; but that cannot affect the application of the opinions of the Chancellor and the Court of Appeals as to what was our *undertaking*. They protected it, and when the franchise was attacked, they *defined its extent*, in order to protect it to that extent only. We now *know the object* of the creation of this corporation, and no man can gainsay it.

Everhart v. The Westchester & Philadelphia R. Co., 28 Penn. 339; *Sparrow v. Evansville & Crawfordsville R. Co.*, 7 Porter (Ind.) 369; *Sprague v. Illinois River Railroad*, 19 Ill. 174; *Joy v. Jackson*, 11 Mich. 175.

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In *Bissell v. Mich. So. R.*, 22 N. Y. 258, the English cases were reviewed, coming down to the case in the House of Lords, of *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, then the last authority on the question. Since then this question has been the subject of an adjudication in the House of Lords.

The views of Judge Comstock, in *Bissell v. The Michigan Southern Railroad Company*, have been established in England. The head note of this decision in the House of Lords, reads as follows: "That the contract was not *ultra vires* of the directors in the sense of being *prohibited* by the legislature, and was therefore a legal contract, binding on the company." 39 *Law Jour. Ex.* 217.

In the case of *Taylor v. Chichester and Midhurst Railway*, the company agreed to pay the plaintiff £4000 for land, which they proposed to take for an extension of their road, and for personal compensation. They adopted another line for their road, and did not require his land. He sued on the agreement, and the defence was *ultra vires*. In the Court of Exchequer, in 1866, 4 *Hurlst. & Coll.* 409, the contract was held to be binding on the defendant, and judgment was given for the plaintiff. On appeal to the Exchequer Chamber, in 1867, 2 *L. R. Ex.* 356, this decision was reversed by the majority of the judges, on the ground that the covenant required a misappropriation of defendant's funds, and was *ultra vires* in the sense that the legislature intended that such a contract should not be made, and that the company was therefore not bound by it. Willis and Blackburn, the dissenting judges, held that the contract was not *expressly*, or *by necessary implication*, *prohibited*, and that the company was, therefore, bound. They followed the case of *Eastern Counties Railway v. Hawkes*, relied on by the Chief Justice in *Bissell v. Michigan Southern Railroad Company*, and held, further, that "a company incorporated by statute is entitled to make all contracts connected with the purpose of its incorporation not expressly, or by necessary implication, prohibited. All such contracts are

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prima facie valid, and it lies upon a company seeking to repudiate a contract, to show that it is prohibited; not upon the opposite party to show that it is authorized."

The opinions of these judges, pp. 375, 393, present a full view of the cases, and are now upheld as the law.

The reversal of the judgment of the Exchequer Chamber by the House of Lords, in 1870, is found in 39 *Law Jour.* 217; *L. R.* 4, *Ho. L. Cas.* 628.

Lord Westbury, who followed the Lord Chancellor, said, page 226: "It would stop all railway companies in all their transactions; for there is not a company, I suppose, that has not, in the course of time, added some new undertaking to the old one."

A contract is *ultra vires* only when from the express provision, or necessary inference, the act of incorporation prohibits it. *South Yorkshire Co. v. Great Northern R. Co.*, *Exch.* 55, 84; *Mayor of Norwich v. Norfolk Railw. Company*, 4 *Ell. & Bl.* 397; 30 *E. Law & Eq.* 120; 24 *Law Journal, N. S.*, *Q. B.* 105.

See the opinion of Lord Wensleydale, in the Scottish Northeastern Railway against Stewart. 3 *McQueen* 382, 15; *Godifroi & Shortt on Railw.* 81, 72; *Gregory v. Patchett*, 33 *Beav.* 595; *Charlton v. Newcastle & Carlisle Railw. Co.*, 5 *Jurist, N. S.*, 1096; *Ex parte The Peru Iron Co.*, 7 *Cowen* 540; *Kerr on Inj.* 569.

The law as laid down in England before the recent cases, covers the defendant's course entirely. In 1867 they carefully distinguish between the cases where the contract fell properly within the object of the company. *Kerr on Inj.* 54 and cases; *A. & A. on Corp.* 162.

Where a lease was made by express authority conferred by statute: Held, that the directors of both roads were bound, as were the majority of the stockholders in both, to conduct and administer the roads according to its terms, and their liability to the stockholders of each road the same as though they had been united by act of the legislature upon

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the same terms and conditions as those contained in the lease. 43 *N. H.* 515.

In cases where it has been held that a railroad company cannot, by leasing its corporate property and franchises, relieve itself from liability to the public for injuries sustained and damages resulting from breach of contract or duty by the lessee, an immense mass of authority sustains the leases incidentally, and manifests the absurdity of the position taken in the bill, "that the lease would be a virtual dissolution or extinguishment of the said United Companies." *Ohio & Mississippi R. Co. v. Dunbar*, 20 *Ill.* 623; *Langly v. Boston & Maine R. Co.*, 10 *Gray* 103; *McCluer v. Manchester & Lawrence R. Co.*, 13 *Gray* 124; *Ingersoll v. Stockbridge & Pittsfield R. Co.*, 8 *Allen* 438; *Wyman v. The Penobscot & Kennebec R. Co.*, 46 *Me.* 162; *Stearns v. The Atlantic & St. Lawrence R. Co.*, *Ibid.* 95; *Whitney v. The Same*, 44 *Ibid.* 362; 1 *Redf. on Rail.* 590, § 142, clause 3, and cases in the note.

In the *York R. Co. v. Winans*, 17 *How.* 30, it was held by the Supreme Court of the United States, that a railroad company organized under a charter from Pennsylvania, is responsible for the infraction of a patent right respecting cars, although the entire capital stock of the company was held by a connecting company in Maryland, which latter company also worked the road by the instrumentality of its agents and motive power and cars. That the obligation to the community which the Pennsylvania railroad was placed under by its charter, cannot be evaded by any transfer of its rights and powers to another company. Justice Campbell, in delivering the opinion of the court, said: "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and complete responsibility for their insufficiency provided, as a remuneration to the community for the grant. The corporation cannot absolve itself from the performance of its obli-

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gations without the consent of the legislature." Citing *Beman v. Rufford*, 1 Sim., N. S., 550; *Winch v. The B. & L. R. Co.*, 13 L. & E. 506.

The lessee of a railroad is an agent of the corporation under the general railroad act of Vermont, making such corporations *and their agents* liable for damages occasioned by want of fences and cattle guards. *Clement v. Canfield*, 28 Vt. 302.

As the act of 1870 has been in force more than a year, and the bill sets out that the contract was adopted by the corporation, it seems as if the discontented stockholders have acquiesced, that is, taken no step until the contract was completed, and, under the English ruling, the United Companies could be compelled to execute the lease.

If so, the right to interfere by way of injunction on the part of the stockholders, now for the first time coming into court, is lost by acquiescence. 1 *Redfield on Railways*, p. 74, § 20, clauses 11 and 12; *Graham v. Birkenhead, &c., Railway Co.*, 6 E. L. & Eq. 132; *Beman v. Rufford*, *Ibid.* 106.

Lord Cranworth said: "This court will not allow any of the shareholders to say that they are not interested in preventing the law of their company from being violated." *Ffooks v. London & S. W. R.*, 19 E. L. & Eq. 7.

See *Chapman v. The Mad River R.*, 6 Ohio St. 119; *Godifroi & Shortt on Railways*, p. 87. See 2 *Redf. on Rail.*, p. 356, clause 3, as to how slight a matter in such cases is considered acquiescence. *Kerr on Injunc.* 202.

Mere objection, or protest, or threat to take legal proceedings, is not sufficient to exclude the consequence of laches or acquiescence. *Birmingham Canal Co. v. Lloyd*, 18 Vesey 15. *Kerr on Inj.* 203, and cases cited.

If one neglects to apply as soon as he is acquainted with the matter, he cannot have an injunction. *Hodges on Railways* (4th ed.), page 62, and cases cited; *Attorney-Gen. v. Briggs*, 1 Jur., N. S., 1084.

As the injury to a company in being stayed is great in

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proportion to the magnitude of their operations, the court will, in general, hold even slight acquiescence as a bar to relief. *Kerr on Inj.* 202; *Greenhalgh v. Manch. & Birm. R. Co.*, 3 *M. & Cr.* 784; 3 *Railw. Cas.* 120.

But this matter of acquiescence rests upon another principle of which nothing has yet been said. It is beyond dispute, that the acquiescence of an agent is binding on the principal, within the scope of his authority. The company being authorized by the act of 1870, as well as by their common law power, to exercise their discretion in reference to the employment of agents and the management of the road, they leased the road as the agents of the stockholders.

Their acquiescence was the acquiescence of every stockholder, subject to the condition of obtaining the requisite two-thirds in interest. Each stockholder can vote as he pleases; but when the condition is fulfilled, which is alleged in the answer, the stockholders are taken to have acquiesced through their agents, whom they appointed for such purposes at their last annual election. *Kerr on Inj.* 202.

From the foregoing examination of the authorities, it seems to be clear:

1. That the majority can control the minority in a corporation, in all the operations of the company within the range of its organic law.

2. That the modern doctrine is, that the legislature may extend the lines of a railway, and consolidate companies, and the shareholders are bound by the acceptance of a majority. That it is incident to every corporation to obtain such extension and enlargement of its corporate powers as the course of trade and enterprise, and altered circumstances, shall render necessary or desirable, not altogether inconsistent with its original creation.

3. That the leasing of one road by another to carry on the business for which it is chartered, authorized by the legislature, and approved by the majority of stockholders, is

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id, and that contracts to that effect will be enforced in equity; the lessees being simply the agents of the lessors.

4. That the want of express power in the charter does not make it illegal to make a contract connected with the purpose of the corporation not expressly, or by necessary implication, prohibited, and that such contracts will be enforced in equity.

5. That in cases where a single stockholder might object, he waits until the corporation have concluded their contract with a third party, knowing of the negotiation and the passage of an act to authorize it, his right to object is lost by acquiescence, and the act is valid. If the act is within the scope of the authority of the agent, the silent principal acquiesces.

6. That the policy of the state and the uniform custom toward these companies and others, acquiesced in for nearly forty years by the stockholders, from the marriage act to the consolidation with the New Jersey Railroad Company, is an acquiescence which deprives a single stockholder from objecting to a smaller alteration, which is a matter confided to the discretion of the directors, and authorized by legislative authority.

Let us now examine briefly, taking the case as stated in the bill, what is the contract adopted and ordered to be executed, and what is the authority for it?

If it be not a fundamental change in the organic law changing the object of the association, although not specially authorized by an act of the legislature, it is valid, and an injunction should not issue under any ruling of any court heretofore made in this state or elsewhere.

But the authority for this contract is an act of the legislature set out in the bill passed in 1870. It is entitled "An act to enable the United Railway and Canal Companies to consolidate their stock, and to consolidate or connect with other companies." It recites in the preamble: "Whereas,

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the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, sometimes called the United Companies, and the United Railway and Canal Companies, are identified in interest, *and have also an identity of interest* with the Philadelphia and Trenton Railroad Company and other companies; therefore."

Now, this preamble acknowledges the valid completion of the consolidation with the New Jersey Railroad by the lease and subsequent act to validate the agreement. It further, in continuation thereof, acknowledges that thereby there is *an identity of interest* with the Philadelphia and Trenton Railroad Company. It confirms the ratification of these consolidations when two thirds in interest approve it.

It then declares it lawful, by the same vote, to consolidate with the Philadelphia and Trenton Railroad Company, which is alleged, in the bill, to be a corporation outside of the state, (and is not a party to the bill,) "and with any other railroad company in the state, or *otherwise*, with whom they may be identified in interest, or whose works shall form, with their own, continuous or connected lines, or to make such other arrangements for connection or consolidation of business with any such company or companies by agreement, contract, lease, or otherwise."

That the word "otherwise" after the words "in this state or" referred to the antecedent "state," and meant *in this state or not in this state*, cannot be disputed, either from the grammatical construction of the sentence, that being its nearest antecedent, or from the context. That a *foreign* corporation was intended to be consolidated or leased, and one with whom they are connected and have continuous lines, is plain, because that is the case with the Philadelphia and Trenton Railroad, who are mentioned by name.

The apparent denial of the fact in the bill, that the Pennsylvania Railroad Company does not form a continuous and connecting line, arises from the persons who verified the bill, swearing to the conclusions of law that the draftsman of t-

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l inserted. Separating the Philadelphia and Trenton railroad, which was consolidated by this act, and over which connecting lines had been run for twenty years, from the rest, because it is called a foreign corporation and not made a party to the bill, it may be true. As a fact it is not true. The answer sets forth fully all the contracts and various arrangements by which they are shown to be continuous and connecting lines, in every sense, both as to the roads and the business regulations. But this act proceeds to require that if any stockholder or stockholders shall be dissatisfied, the said company shall pay to such stockholder the full value of his or her stock immediately prior to such consolidation or lease," and provides the means of ascertaining its value.

It is objected in the bill that the Constitution of the state requires that compensation shall be "*first made*" before the taking, and that although the assessment is made before the taking, compensation is paid afterwards.

This is not in fact true. In the first place the property is not taken at all but remains still under the control and management of the trustees, who manage their business agents. It was recently decided in New York that a railroad company who had a lease on real property which had not expired could proceed and condemn the property by the power of eminent domain. The tenures are totally different; one by purchase, and the other by condemnation.

But this point is too finely drawn. The *compensation is previously made*, and may actually be paid by the party. Under the act there is simply a privilege to the party when property is taken (if it be taken), to have this time to assess its value. 55 Penn. 350; *Angel & Ames on Corp.*, § 192, and cases; 3 Zab. 9; 13 How. 518 and 83; 6 How. 529.

If it were real estate, the time when it was "taken" would be a definite point, but as it is an incorporeal hereditament it is not taken at any particular moment; it is incapable of being "touched or handled," and, therefore, cannot literally be "taken" in the way of sensation or feeling.

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It is really only "taken" when the compensation is paid. If they enter before, it is only to *explore*. They neither "take," "have," nor "hold," *until they compensate*. The court would be bound to give the act a constitutional construction, if possible, and if they thought it necessary to sustain it would hold that "immediately prior to the execution of the lease, compensation should be made."

The act was intended to confer the power of leasing or consolidating with the Philadelphia and Trenton Railroad Company, the Pennsylvania Railroad Company, or any other company, foreign or domestic, which fulfilled the requirements of connection, identity of interest, etc.

It has done so effectually.

Mr. Gilchrist, Attorney-General, for the state.

I appear before the court in this case, in my *official* capacity alone. I am retained for neither party. The cause is really a private one between private parties. The state is a holder of shares of the stock of the United Companies, and, according to a familiar practice, is allowed to be heard, though not a party, in a case of this kind. It is the interest of the state—even assuming that by the terms of the act of 1870, it has consented to this lease—that it should not be made, if the act does not make the provisions necessary to pass a good title to the works and franchises. Such an abortive lease would not accomplish any good purpose, that the legislature could possibly have had, in giving its consent to the making of a lease.

It seems to me that the act of 1870 does not make the necessary provisions to justify a lease, against the consent of a minority of the stockholders, and that neither a lease to the corporation of another state, nor to a corporation of this state, can be made under this act, against the consent of these complainants.

The answer admits the complainants are shareholders in the stock of the United Companies, and dissent to the lease.

The answer also admits the existence of all the charters

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ements, which define the nature and extent of the
granted to the United Companies.

not deny the allegation of the bill, which is proved
idavits annexed to it, that the complainants have
ented to the act of 1870, but have always resisted
liated it. These admissions and these proofs are
it seems to me, to show that the making of this
any lease of these works, under the act of 1870, is
2.

ot maintain that the legislature cannot by law,
the making of a lease of corporate franchises
he consent of all those who are holders of a share
ck at the time of the passage of the law; for the
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it domain, and take—first making compensation—
of any shareholder who refuses to give or sell his
the public use. The stock being taken out of the
the dissenters, there are no persons capable of dis-

All property is subject to the right of eminent
Any owner of property, whether it be land or a
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compensation. So sacred too, is property consid-
he is not bound to yield it up, even for public use,
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until such just compensation is ascertained in due
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of an individual or a private corporation, a just
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nstitution requires that there shall be no uncer-
contingency, or delay about his compensation,
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If the act of 1870, beside providing that the franchises and property might, for the public use, be leased against his consent, also provided, that *before* the lease, he should have the value of his share of this property, or which is the same thing, the value of his stock, ascertained, and that value placed in his own hands, or tendered to him, the franchises and property of the corporation might then be leased as the act directs.

This is the ordinary way in which all property is taken and delivered over to individuals for the public use. This is the way in which leases of railroads, and of all corporate property and franchises, must be made.

So that, in maintaining that this proposed lease cannot be made under the act of 1870 without the consent of every shareholder, I am not contending that corporate franchises and property cannot be leased if one shareholder dissents, and that there is no way of removing this obstacle; but that the legislature, by the act of 1870, authorizes a lease of the corporate franchises and property to a private corporation, not merely against the consent of the shareholders, but without making the usual and requisite provision necessary to overcome that obstacle. In the same manner I would maintain that a railroad corporation could not build its road without the consent of every landowner whose land it crossed, if the law authorizing the road to be built made no other provision for overcoming the obstacle of a dissent by a landowner, than the act of 1870 does to overcome the dissent of a stockholder.

An authority given by legislative act to a railroad company to enter upon lands necessary to build a railroad *from Newark to Trenton*, and take the lands of all owners, if *two thirds* of them consented, without provision was made for *compensation* for the taking of the land of unwilling owners, would plainly violate that part of the Constitution which requires that such a naked authority shall not be given. Under such a law it might therefore be properly said that

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d could not be built without the consent of every
he land on the route between the termini.

gislative act, authority were given like that just
in every particular, except a provision that the
owners' land might be taken on compensation,
ie company taking it should not be compelled to
mpensation until three months after the road was
s authority would not be a valid authority, because
e an authority to take property without the *pre-*
nent of the compensation. In such a case, too, it
said, with propriety, that the railroad could not
ithout the consent of every owner of land on the
reen the termini; for if one owner dissented, the
no valid authority to take his land.

t seems to me, are plain cases in which this court
l that the authority given, was an authority given
e corporation to take private property for public
out just compensation *first* made to the owner;
given directly contrary to a constitutional prohi-
s a void authority, and the execution of it proper
ned on the application of any owner.

nds by which this authority is ordinarily given are
hall be lawful for the said company to enter upon,
, hold, and occupy and enjoy" the property re-
These words are not contained in this act. The
es "that it shall and may be lawful for the United
, by and with the consent of two-thirds in interest
ckholders, to consolidate, &c., or to make such
nts for connection or consolidation of business with
ompany, &c., by *lease*, &c., as to the directors of
nited Companies may seem expedient."

s is qualified by two provisos. One is as follows:
led further, that no such consolidation, agreement,
ease, or other arrangement shall have the effect,
strued to release or discharge the said United
, or any or either of them, or any company or
with which any such consolidation, agreement,

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contract, or lease may be made, from any taxes, liabilities, obligations, or duties, which they or either of them may be subject or liable to, either to this state, or to *any person or persons.*"

The other proviso makes it plain that the legislature intended that the dissenting stockholders should be compensated for the change which the act authorized. "Provided further, that if any stockholder, or stockholders, being at the time of making any such consolidation, agreement, contract, lease, or other arrangement, shall be dissatisfied with the same, the said companies shall pay to such dissatisfied stockholder, the full value of his, her, or their stock immediately prior to such consolidation, agreement, lease, or other arrangement, to be assessed by three disinterested commissioners, appointed for that purpose by the Supreme Court, or Court of Chancery, of this state, on the application of either party, made upon twenty days' notice; but the said companies shall not be compelled to pay for stock of any such dissatisfied stockholder, or stockholders, unless or they shall give written notice of such dissatisfaction to the president, secretary, or treasurer of the company within three months after such consolidation, agreement, contract, lease, or other arrangement, shall have been made and consented to by the requisite number of stockholders."

The making of a "lease" of all the works, franchises, and property, even of the cash, of the United Company for nine hundred and ninety-nine years, is the thing authorized to be done under this act.

As the objects of the corporation are distinctly stated in the charter, that becomes the test, whether any act proposed to be accomplished by the corporation is for the promotion of those objects. If tried by this, any object proposed not one of the objects of the corporation, to accomplish which will be violating the contract.

Whether an authority to make a lease of the franchises and all the property of a corporation, against the dissent

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one or more stockholders, would be an authority to impair the contract between the corporation and any one who is a dissenting stockholder at the time of the making of it, will appear, if we consider the effect a lease will have when it is carried into effect.

Though after the lease shall be carried into effect, the stockholder will hold a certificate of stock, which, on its face, declares him entitled to a certain number of shares of the capital stock of his corporation—that which *was* the capital stock of his corporation, will, against his consent, on the day after the lease takes effect, be an entirely different thing. It *was* the corporeal works and property then held by the corporation *in possession*, with most extraordinary powers and privileges, enabling the corporation to use and operate the works, exercise the franchises of taking tolls and fares, and divide the profits thereby made; it *will* be a rent. On the day after the lease shall take effect, the capital stock of the corporation will consist of no corporeal works or property whatever *in possession*. The rent, though capable of seizin, is not of corporeal possession. The original capital stock will be passed to the lessee; a new capital stock will be created, and though more or less valuable, it will be an entirely different one; the old certificate of stock will not be called in; he will hold it; it will be unaltered in its language; it will entitle him to the same number of shares in the capital stock of his corporation; but his corporation will be shorn of all means of making any profit for its stockholder; and every power and privilege to use and operate the works and exercise the franchises, and consequently the capacity to make and divide any profits therefrom, will be entirely gone for nine hundred and ninety-nine years.

The structure of the corporation for the next nine hundred and ninety-nine years will be completely altered. Before, it was an artificial being, with ample and important franchises and faculties, by the exercise of which, and the operation of its great works, it had profited its stockholders

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for a generation. After, it will be an artificial being, without either franchise or faculty, for nine hundred and ninety-nine years, except, perhaps, (and it is only *perhaps*) the franchise and faculty to take and receive the rent and divide it among those who have now become stockholders in a valueless reversion, and in a rent issuing out of what will become the property of the lessee.

The franchises and faculties it before had, and the works, and other property of the corporation, it will have, by contract, rendered itself incapable of holding or exercising or enjoying during nine hundred and ninety-nine years. All these operations the taking effect of the lease *must* have on the corporation. The corporation will be denuded for nine hundred and ninety-nine years of every characteristic it had; of every marked individuality it had; its identity will be gone. Nothing but its history can show what it has been; what it was before the lease took effect. On examining it, and every feature it has, after the lease shall take effect, nothing can be recalled but its origin; that was legislative. If its origin was not legislative, it could not continue to exist, thus shorn of its features, franchises, and faculties. It will be almost literally a lifeless hulk; practically, it will be a mere ruin. It will exist—but the lease having taken effect—without a faculty it had when it showed life and usefulness. Its powers and franchises will have passed from—will have been taken from it for nine hundred and ninety-nine years for the public use. This is the operation the taking effect of the lease will have upon the artificial being itself.

But these are not all of the results the taking effect of the lease will accomplish. While the certificate of a share or shares in the capital stock of the company of the same *name* will remain—it will be a certificate of a share in the capital stock of a corporation of an entirely different character—in the capital stock of a corporation without a franchise for nine hundred and ninety-nine years (except that of being); without, for nine hundred and ninety-nine years, a single

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lty of making money ; confessedly without, for nine hundred and ninety-nine years, a single faculty that can contribute to the public use—for the taking effect of the lease, have divested it of all of them, to enable another company to put them to a greater public use ; without, for nine hundred and ninety-nine years, a single shred of the capital stock which the certificate of stock guaranteed the stockholder certain shares of. The certificate of stock will be a certificate of a share or shares in a corporation totally different in every substantial and valuable characteristic—different shares of an entirely different thing—of an entirely different capital stock. All the capital stock will then be a

his rent will not *issue out* of the capital stock of the corporation. The rent will *be* the capital stock of the corporation. The *former* capital stock out of which the rent will *be*, will be the capital stock and property, not of the stockholders' corporation, but of *another* corporation.

The stockholder's certificate will no longer give him any voice in the appointment of managers of the old capital stock out of which the rent will then issue ; though the wisdom of this management must constitute the chief security for the rent, which the taking effect of a lease will force upon him.

Under these new circumstances, produced by the lease having taken effect, will not the stockholder, although he retains the *old* certificate, have a share in a new thing ? Will he not have lost his share in the *old* thing, and this without his consent ?

Will not all of these extraordinary changes, which will be produced if the lease takes effect, the very changes which the courts of this state have repeatedly held do, if produced without the assent of a stockholder, impair the contract between him and his corporation ? *Kean v. Johnston*, 10 N. J. L. 401 ; *Zabriskie v. Hack. R. Co.*, 3 C. E. Green, 179. Will yet a lease which will produce these effects, be authorized by this act to be made without his assent. If the title

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of the dissenting stockholder to his stock, is not divested before these changes are produced, is not there a contract between him and the corporation, which is impaired by these changes?

A change can be lawfully made in this contract with his consent. A change can be lawfully made in the structure of the corporation, or any other change which a lease will produce, if the person who is a stockholder assents to them or if, before they are made, the stock held by any dissenter is taken under the right of eminent domain; for his stock being taken, no contract with a dissenting person is in existence. This act is plainly based on the idea of the necessity of *taking* the stock of dissenters under the right of eminent domain. That the act recognized the necessity for the taking of the stock of the dissenter is plain. It directs the company to pay him for it, if he dissents and gives notice of his dissent at a certain time named. The act certainly *did* not contemplate that he should be paid for his stock, and keep it, too. It contemplated that after the payment he should no longer keep it, that it should be taken by, or pass to somebody else, or be extinguished—which is only another word for saying it shall belong to the corporation.

It may be said that the act *did* contemplate that the stock should be taken, but not till *after* the lease was made. If this be so, then it is plain that the stockholder, until his stock is taken, is a stockholder, with every right and privilege of a stockholder—a stockholder holding a contract with the corporation, by which it is bound not to alienate its franchises, but to exercise them, to use the works and not dispose of them, and to make profits out of the exercise and use of them. Being a stockholder with such inviolable contracts, this court will restrain the making of this lease, which alienates the franchises, and disposes of the works, and puts it out of the power of the corporation to exercise them, and by which it contracts *not* to exercise or use them, or make a profit for its stockholders.

In this aspect of the case—that the act contemplates that

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the stock shall be taken, but not till after the lease is made — *the title* of a stockholder to his stock, before and at the time of the lease, is perfect, and his right to restrain a threatened breach of the contract between him and the corporation, by the making of the lease of the franchises and property for nine hundred and ninety-nine years, seems to me indisputable. It may be said that the provision which declares that the companies shall not be compelled to pay for the stock, unless the dissenting stockholder, within three months after the lease, shall give notice of his dissent, was a mere indulgence to the stockholder which gives him three months to make up his mind whether he will keep his stock or take its value at the date of the lease. It may be that this was so intended; but the stockholder has, without this proffer, a more sacred right—a right that, until he makes up his mind to assent, and does actually assent, his contract shall not be impaired by stripping his corporation of all its franchises, and transferring all its capital, stock, and the title and the possession of all its works to a stranger, by means of a lease for nine hundred and ninety-nine years. At any time before the lease is made, he has the right to come into this court, and ask that his corporation shall not violate that contract, but be enjoined to keep it. The act may have been intended to give him a right after the lease was made, instead of the right he would have in this court before the lease was made to restrain the making of it; but the gift of this right *after* the lease, even if it were expressly said it should be instead of the right to come into this court *before* the lease and restrain it, would not take away the right to come here beforehand. The right to come here before the lease and restrain it, cannot be taken from the stockholder, for it depends on the provision of the national Constitution that no state shall pass any law impairing the obligation of a contract, and on the provisions of our own Constitution that the legislature shall not pass any law impairing the obligation of contracts, or depriving a party of a remedy for enforcing a contract which existed when the contract was

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made. It matters not how much the stockholder was to be indulged by this clause; he already had a higher and stronger right secured to him by irrefragable sanctions. That right still subsists; that right this court is bound to enforce, notwithstanding any law whatever that the legislature may make, giving substitute rights, or attempting to cripple the power of this court, to give the old relief to which the party was entitled before the passage of any such law.

It may be said that there was no necessity for taking the stock at all, and that the provision for the payment of its value to the stockholder, was a mere gratuity. If there was no necessity for taking the dissenter's stock, as a step toward the lease, the payment would be a mere gratuity. Whether there is a necessity to take the stock of the stockholder, to enable a lawful lease to be made, depends upon the question, whether, while the stock remains in the hands of the stockholder, there is not a contract between him and the corporation, that the franchises shall be exercised and not disposed of, that the works shall be used to make profit for the stockholder, and not passed over to others.

That there is such a contract between the corporation and the stockholder at the moment he becomes such, I think, all the cases hold; and that it subsists, until he consents to its abrogation, or ceases to be a stockholder, I think is apparent. If the contract continues, and a lease is made, against the consent of the parties to it, to say that it is a lawful lease, is to say that the law authorizes the other party to do that which the other party has contracted not to do, and which the Constitution says no law can authorize him to do. The execution of such a pretended law will be restrained, and the corporation held to its contract by this court, by injunction. Hence, if a lawful lease is to be made, the stock must be taken and paid for, or the contract will subsist.

It may be said that there can be no taking of the stock within the constitutional provision against taking property,

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cause it is not property. But the charters of the United Companies expressly declare the shares of stock to be personal property. *The Canal act*, § 17; *The Camden & Am- act*, § 16; *The New Jersey R. R. act*, § 2.

It appears to me that the act of 1870 did intend to give right to take the stock of the dissenting stockholder. The creation of a special tribunal to ascertain and determine value of the stock of any dissenter, and the direction that that value should be paid, can be accounted for on no other basis. It is a very important part of the act; it follows immediately after the authority to lease; it is introduced by way of proviso after that authority and in qualification of it; *it is a condition upon which the authority to take a lawful lease is given.*

The office of a proviso is to repeal the *purview*. *Town-ard v. Brown*, 4 Zab. 86. This proviso repeals the authority to lease, so far forth as any dissenting stockholder is concerned, and as long as one exists, no lease can be made. He is to be dealt with otherwise. His stock is to be paid for—and if paid for, of course it is to be taken; he is not to be paid for his stock and keep it too; but his stock is to pass from him.

I have endeavored to establish that so long as the stock continues the property of a dissenting stockholder, so long as there is a person standing in the way who holds such a contract of the corporation, that against his consent, no lawful lease can be made. Because the contract will continue so long as the dissenter holds his stock, and cannot be overcome except by his consent, the taking of the dissenter's stock before the lease is attempted, is necessary.

This act does provide for the taking of the dissenter's stock as one of the means necessary to make the lease, but it does not provide for its being taken *at the time* when it can assist the lease. The constitutional provisions against impairing contracts cannot be complied with if a lease is made before the stock is taken. If the act of 1870 does not provide for the dissenter's stock being taken before the lease

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is made, it authorizes as lawful that which all the authorities agree will impair a contract, a contract which, from its nature, subsists so long as the title of the dissenter to his stock subsists.

Does the act authorize the stock to be taken *before* the lease? The only parts of the act from which it can be ascertained whether the stock was to be taken *before* the lease, are the first and second provisos.

The provision for the payment of the dissenting stockholders contemplates that the stockholder who is to be paid shall be one who continues a stockholder down to and at the very time of making the lease, and even afterwards, for it is not every dissenting stockholder that is to be paid—it is “*such* dissenting stockholder,” that is, the stockholder before mentioned in the clause, “if any stockholder, being *such at the time* of making any such lease shall be dissatisfied.”

The stockholders who are to be paid, then, are only such as continue stockholders at the time of the making of the lease.

The act, therefore, cannot contemplate taking the stock of a dissenter *before* the lease, for it pays no stockholder who is not *such at the time* of the lease. But the act goes further and indicates most distinctly, that the stockholder whose stock is to be taken must continue *such* till *after* the lease; it pays no other. He must not only be a stockholder at the time of the lease, but afterwards; for unless *after* the lease he gives notice of his dissatisfaction, he is to have nothing. The act says expressly, “but the said companies shall *not* be compelled to pay for stock of any such dissatisfied stockholder or stockholders, unless he or they shall give written notice of such dissatisfaction to the president, &c., within three months *after* such lease shall have been made.”

This provision, postponing the *obligation* to pay a dissenting stockholder till *some time after* the lease, plainly shows that the act contemplated that the dissenter's stock should *continue* vested in him till after the lease, for there is no

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gation to pay till notice, and no notice can be given, which will be of any validity to raise the obligation to pay, till *after* the lease. If he is dissatisfied *before* the lease, it gives him no compensation. He may be dissatisfied before he gives notice, but he must be dissatisfied at the time of the lease, and give notice *afterwards*.

He must retain the character of stockholder until the time comes when he can give the notice. On giving this notice at the particular time mentioned in the act, and at no other time, does the obligation to pay arise; for the clause is in the negative. It does not say that the company shall pay when notice of dissatisfaction is given, but that the company shall *not* be compelled to pay, unless within three months *after* the lease the notice is given. "Within" three months *after* an event is *some* time after. It is not more. This the courts of New York have held. Our Court of Chancery and Court of Appeals, in the case of Krouse v. the Continental Hotel Company, held that where a statute which required a chattel mortgage to be filed "within" a certain time before a day, filing it before the day "within" which it was required to be filed, was no compliance with the act. So here the obligation to pay arises only some time *after* the lease; at no time before it; and then it does not arise to any one but to him who continues to be at that time—after the lease—a stockholder. This, it seems to me, makes it clear that the act gives no indication of an intention that the dissenting stockholder's stock shall be taken before the lease.

The words "shall pay to such dissatisfied stockholder or stockholders the full value of his, her, or their stock, immediately prior to such 'lease'" describe what valuation shall be placed upon the stock, *i. e.*, the value immediately before the lease. They do not fix the time of the payment of *that* value, and therefore afford no indication that the stock was to be taken before the lease, but merely that *that* value before the lease was to be paid, and to be paid as the subsequent clause says, *after* the lease—after notice given

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after the lease. When we are considering whether the act requires the stock to be taken before the lease, or not, it is proper to give all due weight to the clause in the second proviso—that the lease shall not have the effect, or be construed, to release or discharge any contract. If the clause authorizing the stock to be taken is capable of the construction that the stock is to be taken after the lease, and if that construction gives to the lease the effect of releasing or discharging the contract with the stockholders, it might be asked, why should not that clause, as to the taking, receive a different construction—a construction that it permits and enjoins the taking before the lease?

But the language authorizing the taking, cannot bear that construction. Every word in it looks to a taking *after* the lease, and to a payment after the lease, to a continuation of the relation of stockholder after the lease, and it is impossible to construe it as indicating an intention to take before—the words are too strong and specific. The stock cannot be valued, the commissioners cannot be appointed, till *after* unless the stockholder continues a stockholder at the date of the lease, and is *then* dissatisfied; and, indeed, it would seem not until the written notice of dissatisfaction is given which must come *after* the lease, to entitle the stockholder to valuation or payment.

But if this construction were possible, the United Companies intend, they say, to execute this lease as soon as practicable, after two-thirds of the stockholders assent. So that, even with this construction, the lease cannot lawfully be made till the stock is taken, and as it is now threatened to be made without taking the stock first, it must be restrained.

It seems to me, from these considerations, that it is plain that the clause authorizing the taking of the stock will not bear the interpretation of an authority to take *before* the lease, and, on the contrary, does not permit the taking till afterwards, thus requiring the dissatisfied stockholder to remain a stockholder till after the lease; the contract of the

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corporation with the stockholder consequently continuing in force in existence.

To say that a lease authorized while a stockholder continues such and his contract is in force, and he dissents to the lease, is a lawful lease, is to say that a lease is lawful which not only impairs, but overrides, prostrates, and destroys the contract against the will of one of the contracting parties. In such case, neither the lease, nor any pretended law which sanctions it, is valid or lawful; both are contrary to the Constitution.

It seems to me the clause giving the right to take the stock after the lease only, was conferred intelligently and knowingly; but the clause conferring it is so framed that it is useless for the only purpose for which, if framed properly, it could have been used. It is so framed that it cannot be used at the very time when only it could be of any use to promote the object of the act, which was to transfer the title to these franchises and property to another corporation. It is so framed as to make the power to take the stock exercisable only *after* the contract (which exists with the stockholder so long as he is a stockholder) shall have been entirely disregarded, and his right to redress for the injury complete. It makes the power to take the stock exercisable after the injury of impairing his contract has already been inflicted upon him.

The effect of so framing the clause, giving the right of eminent domain, as to be exercisable only after the lease is given, is to make the authority to lease an authority to disregard the contract; and, as such, an illegal authority. An authority to disregard a contract cannot be given by a law of the legislature; and, therefore, so much of the law as gives such an authority is void, and the authority is void. It may be said that there is no distinction, in substance, between impairing the obligation of a contract and compensating for that illegal injury, and *taking* the property created by the contract and paying for it; but the law and the Constitution say there is.

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“The eminent domain, the highest and most exact idea of property, remains in the government, and it has a right to resume the possession of the property whenever the public interest requires it.” *West River Bridge v. Dix*, 6 How. 535.

“This taking by the state has never been held to impair the obligation of the *contract by which* the property is held.” *Ibid.* 536.

“However nice the distinction may seem to be—when examined it will be found substantial. The Constitution does not prohibit a state from impairing the obligation of a contract *unless* compensation be made, but the inhibition is absolute.” *Ibid.* 538.

“The power of eminent domain is *implied* in the contract.” *Ibid.* 542.

It can, therefore, be executed on *that which is held* by the contract, and without impairing its obligation. To take stock, or a franchise, under the right of eminent domain—both of which are held under, and existing by force of, a contract—is not to impair the obligation of the contract, not to violate it; but to regard it, recognize it, to assume its validity, to concede that it created and vested the property. The new taker holds the property under the contract as a link in the chain of his title to it; and the contract is necessarily left unimpaired, so that it may be a muniment of the title of him in whom the exercise of the right of eminent domain vested the property created by the contract.

The clause in this act, giving the right to take the stock, stays the exercise of the right of eminent domain until after another constitutional right is invaded. How perfect soever *this* clause may be in every respect, the lease made under the first clause will inflict an injury, if made as it must be before the stock can be taken.

It seems to me that this clause was so framed of purpose, and it was endeavored to be cured by giving to the stockholder, after his contract was impaired, the value his stock had at the time of its being impaired. In other words, it

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ves as a compensation for the injury of impairing a contract the compensation which would be due if his *property* had been *taken* at that time under the right of eminent domain, instead of his *contract* being *impaired* at that time. Now, as the Supreme Court of the United States say in the case just cited, "the Constitution does not prohibit a state from impairing the obligation of a contract *unless* compensation be made, but the inhibition is absolute;" and therefore it in no wise cures the act of 1870, which authorizes the use to be made while the stockholder's contract exists, that it gives to the stockholder as a compensation for that *unlawful* act the same compensation that he would have been entitled to if his stock had been taken by a *lawful* act, done under the right of eminent domain. But, in truth, it does not give him the same compensation that he would have been entitled to in the latter case. For he would, in the latter case, have had his compensation for a rightful act *first*, and his property would have been taken afterwards; whereas, here a wrongful act is done *first*, which is considered so violative of all public policy, that it is never permitted, even where the most ample compensation is given, and *afterwards* a compensation is given which would be due for an entirely different and lawful act.

The reason for framing the clause as it was framed, was that the taking of the property beforehand, under the right of eminent domain, would be inconvenient in carrying out the lease in view. The exercise of that power beforehand would require compensation *first*, or before the lease, and would require entirely too solid a confidence in the success of the new enterprise on the part of a promoter of it, to make it entertainable by capitalists. But safeguards for property *are* inconvenient. They *are* obstacles. They are established because they make it inconvenient to appropriate property.

The dissenting stockholder, on examining an act which is worded as this is, might well be impressed with his helpless condition. He sees in this law that the state permits his

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whole interest to be swept away first, and that he is sent to look after a limited compensation—limited to a value at a certain time—either from his own company, *after* it is stripped of its assets, or from a strange company, of whose responsibility he knows nothing and which he more than suspects—a company which may or may not be reached by the process of that state only, whose process he could invoke to bring it to justice.

Such laws ought not to be permitted to pass, and this court sits here with the high function of saying that if passed they shall not be executed.

On the other hand, if this law provided that before his stock was taken he should have the value of it put into his hands, as he, in common with the owner of every other kind of property, is entitled to have it, he would see that all the hazards of the new enterprise were upon those who promoted it: and would have the benefit of the timidity of capital to invest in doubtful enterprises, on the side of his desire to keep his own.

Whatever the compensation is to be: how much it resembles the compensation due for taking his stock—however ample it may be, how fully soever it may be, a compensation for the injury of impairing the contract, the fact remains—the injury to be done under the act of 1870 is the impairing of a contract. The promoters of the act chose to accomplish the lease by impairing the stockholder's contract, first, and then authorize his stock to be paid for afterwards at its value at the time of his contract being impaired. This was their way of accomplishing it. This is not the way of the law, of the Constitution, and it is a way in which this court will not permit a lease to be accomplished. I am sure that if the promoters of the act had perceived that this was the real operation and effect of postponing the exercise of the right of eminent domain under the first proviso until after the lease was made, they would have been the last of all men to ask for a law which permitted the prostration of any contract between the companies and their stockholders; for the

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the existence of corporations and the preservation of all their extraordinary and necessary rights and powers depend upon the existence of a healthy public sentiment which will secure the inviolability of contracts.

The same considerations which show that the United States cannot make a lease of their works and franchises, and that no other corporation can take the lease of them; and that no corporation which takes a lease of these franchises will affect the structure of the lessee corporation in the same manner that grants them affects the lessor corporation.

The law of Pennsylvania is the same as our own law on this subject.

Besides, there is no pretence of power on the part of the court to condemn its dissenting stockholders' stock and so to prevent a unanimous body of stockholders and prevent the execution of any contract that might exist if there were a dissent. More than this: besides the assent of the stockholders, or a condemnation of their stock, the assent of the corporation in which these franchises are to be exercised by the lessee corporation, is necessary to be given to it in special. It is clear that a general authority to lease a franchise to any corporation, would not give the capacity to any corporation to take the franchise and exercise it. A bank could not take such a lease under such a general power, nor an insurance company, nor a manufacturing corporation—under the very supposed implication that an authority to one corporation to lease its franchise to any other, is an authority to any other to take them and exercise them.

The best precedents of enabling statutes of this kind, and there are many, add a distinct clause authorizing a particular corporation, or class of corporations, to take, and so, on principle, it should be.

The other questions which are raised by the pleadings in this private case, I do not feel called upon to discuss. I think none of them so important or so clear against the lease as those I have considered.

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Mr. I. W. Scudder, for defendants.

1. The legislature of the state of New Jersey had the power to pass the act approved March 17th, 1870, entitled, "An act to enable the United Railway and Canal Companies to consolidate their stock, and to consolidate or connect with other companies." A lease executed under the authority of this act, was not in violation of that clause of the Constitution of the United States which declares, "that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

We must look into the charters of the companies—lessors—for the contracts. The charters are the contracts between the state as one party, and the corporations as the other party. These charters are not executory contracts—they are contracts executed—they are grants. There is no contract in any of these charters which prohibits these companies from executing a lease.

The cases which give construction to this clause of the Constitution of the United States, all show that to impair the obligation of the contract, the legislature must make some change in the grant made by the state and contained in the charter; and inasmuch as the charters in question do not prohibit the corporations from making a lease, a law of the state, conferring a power to the corporations to make a lease, would not impair the obligations of the contract. An act, giving power to make a lease, would be an enabling act, authorizing the lessees to execute a part of the powers originally granted.

The following cases were cited and commented on: *Dartmouth College v. Woodward*, 4 *Wheat.* 519; *Providence Bank v. Billings*, 4 *Peters* 558; *Gordon v. Appeal Tax Court*, 3 *How.* 133; *Planters' Bank v. Sharp*, 6 *How.* 330; *Satterlee v. Matthewson*, 2 *Peters* 380; *Holbrook v. Furney*, 4 *Mass.* 566.

Under the lease the obligations of the lessors to the state remain the same. The lessee is to operate the works demised under the charters of the lessors. No property can be

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nless by consent of the lessors. The proceeds of the
ty of the lessors when sold, must be applied to the
ement of the works of the lessors, or to pay debts.
rporations of the lessors remain, and the stockholders
. In case of failure to pay the rent, the lessors
all their property and franchises.

re was no express contract in the charter of the cor-
ns—lessors—that they should not convey and transfer
property. On the contrary, such power was given.
s *River Bridge v. Warren Bridge*, 11 *Peters* 420,
McLEAN, p. 521. “After a careful examination of
estions adjudged by this court, they seem not to have
l in any case that the contract is impaired within the
ig of the Constitution, where the action of the state
t been on the contract.”

Smith on Stat. and Const. Law, p. 409, § 266.

The case of a lease by a railroad company does not fall
that class of cases denominated *ultra vires*, and in
one stockholder can ask for an injunction to restrain
ecution of a lease, to which two-thirds of the stock-
s assent.

cases in which a few stockholders can enjoin a cor-
n, even though the majority should assent, are those
ch the corporation uses its capital and money in a
ss, and for a purpose different from that authorized by
islature.

leading cases stated and reviewed: *Coleman v. East-*
unties' Railway Co., 10 *Beav.* 12; *Hodgson v. the*
of Powis, 12 *Beav.* 397; *Cal. & Dumbart. Junction*
ay Co. v. Magistrates of Hellensburgh, 2 *Macqueen*
Scottish Northeastern Railway Co. v. Stewart, 3 *Mac-*
383; *Bissell v. Mich. South. & North. Indiana R.*
N. Y. 258; *Kean v. Johnston*, 1 *Stockt.* 403; *Za-*
v. The Hack. & N. Y. R., 3 *C. E. Green* 180; *Sus-*
ilroad v. Morris & Essex R., 4 *C. E. Green* 13; 5 *C.*
een 543; *South York. Railway Co. v. Great West.*
ay Co., 8 *Exch.* 73; *Beman v. Rufford*, 1 *Simons* (N.

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S.) 550 ; *Great North. Railway Co. v. Eastern Counties' Railway Co.*, 9 Hare 306 ; *East Anglian Railway Co. v. Eastern Counties' Railway Co.*, 11 C. B. 775 ; *Vance v. East Lan. Railway Co.*, 3 K. & J. 57 ; *Great West. Railway Company v. Rushout*, 5 De Gex & Sm. 307 ; *Hawkes v. Eastern Counties' Railway Co.*, 1 De G., Mac. & G. 735 ; 5 H. L. Cas. 348.

The principles of these cases do not apply to this lease. The United Companies are not to spend money received for one purpose, for another purpose. The railroad and canal constructed for certain purposes are not to be used for other purposes.

The doctrine of partnership does not apply. A stranger cannot be introduced into a firm without the concurrence of the firm. Any person can become a stockholder. Parties must join together having goods, labor, or skill. The stockholder purchases his shares, and leaves the management to the executive officers. Partner liable in his individual estate for the debts of his firm ; not so a stockholder.

3. The lease is said to be against the policy of the law, founded on the case of *Winch v. The Birkenhead, Lancashire and Cheshire Junction Railroad Company*. 13 Eng. L. & E. Rep. 506 ; 5 De G. & Sm. 562.

That case is distinguishable from the lease. It was an agreement which provided for the *amalgamation* of three roads and the lease of a fourth ; and, after the three roads had been amalgamated, the fourth road, or leased road could also be *amalgamated* with the other three. Such an agreement was pronounced *against the policy of the act of Parliament, and savoring of illegality*.

That case, neither in principle nor its facts, can control the case before the court.

One class of cases shows the doctrine of *ultra vires*, viz. the expenditure of the capital of a corporation in a project not authorized by the charter.

The case of *Winch*, it has been contended, shows another class in which money is not expended in a new project, but

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h are said to be against public policy, and savor of illegality. This is not true in fact. A court of equity will not enjoin where the contract is merely against the policy of the state where there is no irreparable injury.

The state of New Jersey has authorized this lease by an act approved March 17th, 1870, entitled "An act to enable the United Railway and Canal Companies to consolidate their stock, and to consolidate and connect with other companies," and this lease, when executed in pursuance of the powers thus given, will be lawful.

The connection is not limited to any class of railroads, whether in or out of the state. The United Companies can lease to "any such companies" as they would have a right to consolidate with. They can consolidate with any company with which they "are or may be identified in interest." They can then consolidate with the Philadelphia and Trenton Railroad Company, as they have "an identity of interest with the Philadelphia and Trenton Railroad Company."

The act empowers a consolidation or lease with a named company out of the state, "and any other companies." It appears then that the power to consolidate with, or lease to any other railroad or canal company," is not by the general scope of the act confined to such companies only as are in the state of New Jersey.

There are three positions set forth by the act which authorize a lease or consolidation. 1. Identity of interest. 2. Continuous lines. 3. Connected lines.

Every one of these three positions have reference to companies out of the state.

The connection of the United Companies in New Jersey with their branches and auxiliary lines, is such as that on the question of intention in the statute they could not be denied.

When the identity or connection must be looked for out of the state. The lines of the companies were continuous

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lines across the state. The bill so charges, as to canal, a "perfect, expeditious, and complete line of water communication between the cities of Philadelphia and New York." By Camden and Amboy Railroad, bill charges "a perfect, expeditious, and complete line of communication between the cities of Philadelphia and New York." By New Jersey Railroad, bill charges, "another perfect, expeditious, and complete line of communication, by way of Trenton, between the cities of Philadelphia and New York."

Charter of canal, § 2, power given "to perfect an expeditious and complete line of communication from Philadelphia to New York," &c.

Camden and Amboy Railroad v. Briggs, 2 Zab. 633; held in a penal suit, that the line extended from New York to Philadelphia.

Continuous lines across the state, into Philadelphia, could only have continuous lines by connection in Pennsylvania. Works out of the state only could form continuous or connected lines.

"In this state or otherwise." The term "otherwise," thus connected, could only mean out of the state. The power to lease, if given generally, would not have been confined to the state of New Jersey. It was intended to make the case clear, by expressions not doubtful—"in this state, or otherwise." The word "otherwise" refers to and is predicated of the conditions in which these United Companies exist—otherwise than in New Jersey. The United Companies were all created by the laws of New Jersey; companies "otherwise," must be such as were not created by the laws of New Jersey.

The concurrent legislation of the states of New Jersey and Pennsylvania give meaning to this act. The "act to authorize railroad companies to lease or become lessees, and to make contracts with other railroad companies, corporations, and parties," was passed February 17th, 1870; the New Jersey act, March 17th, 1870.

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5. The lines are both continuous and connected.

Their contracts, business connections, &c., show this early.

6. The Pennsylvania Railroad Company has full power in v to become the lessee.

The complainants cannot deny this position, as they have t made the Pennsylvania Railroad Company a party.

Two acts make this clear: "An act to authorize railroad npanies to lease or become lessees, and to make contracts th other railroad companies, corporations and parties," proved February 17th, 1870. "An act relating to leases ccontracts for the use of canals or other navigation works railroad companies," approved May 3d, 1871.

The legislature of Pennsylvania have thus clearly conferred the power.

The law is clearly settled in Pennsylvania: *Commonwealth v. The Atlantic & Great Western R. Co.*, 53 Penn.

P. F. Smith's) 9; *The Philadelphia & Erie R. Co. v. The Attawissa R. Co.*, *Ibid.*, p. 56.

7. The complainants can only complain of injury to their private rights. They have no foothold in this court for pretended injury to public interests, or the violation of public property, by this lease. Their private rights can be paid for, and the defendants tender just compensation, in which mode as equity may require. The act of March 17th, 1870, passed by the New Jersey legislature, prescribes an equitable mode of compensating the complainants by commissioners.

This mode of compensation does not violate the Constitution of New Jersey. There are two clauses of that Constitution.

Art. I, pl. 16. "Private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made."

Art. IV, § 7, pl. 9. "Individuals or private corporations

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shall not be authorized to take private property, for public use, without just compensation first made to the owners."

The mode of compensation is not unconstitutional, because no property has been taken. The property of the shareholders has not been taken. The title remains in them. They can vote on the stock. The shares of stock do not amount to a deed for the property. Whatever interest in the property, represented by the stock, remains as before.

The Constitution contemplates that the private property which shall be taken, shall be for public use. Stock cannot be taken for public use. An exclusive right might be condemned, that thereby physical property could be taken for public use. Then the exclusive right would be extinguished. Shares of stock are like choses in action. *Angell & Ames on Corp.*, 9th ed., §§ 560, 563; *Williams on Personal Property* 186.

The language of the New Jersey Constitution, "compensation first made," has a well known history. It was to prevent *land* from being taken first and paid for afterward. *Bonaparte v. The Camden & Amboy R.*, 1 *Baldwin C. Rep.* 205; *Den v. The Morris Canal Co.*, 4 *Zab.* 590.

These cases prove that *land* could, under the old Constitution, be taken and used first and paid for afterwards. The clause in the new Constitution was introduced simply to away with this legal conclusion. *Doughty v. The Somerville & Easton R.*, 1 *Zab.* 443.

The title of a stockholder in his stock may pass by a certificate signed in blank—it passes by delivery merely. The rule of this act, therefore, is just, that the stockholder should dissent to the lease, make known his dissent, and then have his shares condemned, if he seeks compensation that way. If the calling in the aid of commissioners should be regarded as a mode of condemnation under the Constitution, it would nevertheless be legal.

The complainants contend that the lease is not valid against them, because of their objection. If necessary

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to condemn their stock, then the lease is not valid as against them until their stock shall be condemned. The proper time for fixing values would be immediately prior to the making of the lease. Then the ownership of the stock could be ascertained.

The works when leased are subject to public use. Under the Constitution, the legislature can determine the public use and the mode of condemning. The leased roads are subject to the public use, and the legislature have declared that the interest of the stockholders can be condemned. The right to condemn, and the mode of condemnation under this law, are complete.

The bill is not framed on the basis that the complainants want their stock condemned, or that condemnation would be unlawful. The bill is based on the idea that the lease is wholly unlawful, and that the objection of any stockholder can defeat the same. Equity can provide a mode of compensation to the stockholder, if the lease would be inequitable as to him.

The Irrigation Company of France, 39 *Law Jour.*, N. S., *Chan.*; *S. C.*, on appeal, 6 *Law Rep. Ch.* 176; *Lauman v. The Lebanon Valley R.*, 30 *Penn. Rep.* (6 *Casey*) 46; 2 *Parsons' Mar. Law* 555.

8. The lease of the works requiring a continuation of the former use, a majority of the directors and stockholders should control.

Durfee v. The Old Colony & Fall River R. Co., 5 *Allen* 242; *Bank of Augusta v. Earl*, 13 *Peters* 519; *Lauman v. The Lebanon Valley R.*, 30 *Penn. Rep.* (6 *Casey*,) 46; *Nix. Dig.* 341; *Gifford v. The New Jersey R.*, 2 *Stockt.* 172; *Vance v. The Eastern Lancashire Railway*, 3 *K. & J.* 57.

The analogy of a partnership is delusive. Each partner attends to the business. The partnership manage the business. Not so in corporations. Each partner contributes of capital, or skill, or labor. A new partner cannot be introduced without the consent of the former partners. Stockholders change daily, and that, too, by certificates in blank.

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The legislature of New Jersey has declared that the rights of stockholders could be affected without the assent of them all.

By the act (in the case) by which the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad Company, were united as Joint Companies, the consent of seven-eighths was required.

9. The local railroads, constituted in states, under state charters, have been recognized by the courts, as the means by which commerce is carried on, under the clause of the Constitution of the United States, by which Congress shall have the power to regulate commerce among the several states. *The Erie Railway Co. v. The State*, 2 *Vroom* 531.

The Cumberland Road was constructed with the consent of the states through which it passed.

2 *Statutes at Large*, 357, § 3; *Gibbons v. Ogden*, 9 *Wheat*. 203; *Passaic Bridges*, 3 *Wall*. 782.

10. The powers of corporations can be exercised out of the territorial jurisdiction in which they were created; and there is a necessity for the union of railroads in different states, to carry on "commerce among the several states."

Bank of Augusta v. Earl, 13 *Peters* 519; *Lumbard v. Aldrich*, 8 *New Hamp.* 31; *State v. Frecholders of Hudson*, 3 *Zab.* 210; 4 *Zab.* 719, 725; *State of Vermont v. Boston, &c., Railroad*, 25 *Vt.* 433.

11. Assuming that the lease might be avoided, on information filed by the Attorney-General on behalf of the state, the lease, if executed and delivered without the license of the state, would not be void.

Without the sanction of the state, the stockholders of the leased roads would be without remedy, by reason of acquiescence.

This lease does not transfer the franchise of being a corporation.

12. Independent of the covenants in the lease by the lessee, the lease would not in any degree relieve the lessors from

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any obligations which they owe to the state of New Jersey or to individuals.

1 *Redf. on Railw.* 590; *Nelson v. The Vermont and Canada R.*, 26 *Vt.* 717; *Sawyer v. The Rut. & Bur. R.*, 27 *Vt.* 370; *Clement v. Canfield*, 28 *Vt.* 302.

The state and individuals are protected by the express covenants in the lease.

13. The contention that the lease is unlawful because it not only demises the roads and canal, but other property, such as stocks, is unfounded.

The shares of stock in other roads held by the lessors under the sanction of the laws of New Jersey, are the means by which the lessors hold their title to property in auxiliary works, as stock of the Associates of the Jersey Company; stock of the Ferry Company at Camden; stock of the Belvidere Delaware Railroad, &c. They are like the titles to lands which are not now a part of the works. These stocks pass as appurtenant to the demised property. *The Philadelphia & Erie R. Co. v. The Penn. R. Co.*, 53 *Penn. R.* 56.

14. If the execution of such a lease was not sanctioned by the act of New Jersey of March 17th, 1870, and if it is against the policy of the law by reason of the exercise of prerogative franchises in the state of New Jersey, by the Pennsylvania Railroad Company, without sufficient license, the private rights of stockholders would not be invaded, and the only remedy is by *quo warranto*.

Vermont v. Boston, Concord & Mont. Railroad, 25 *Vt.* 433, 441; *Gifford v. The New Jersey R.*, 2 *Stockt.* 177; *Bissell v. The Mich. South. R.*, 22 *N. Y. R.* 272; *Att. Gen. v. Great West. Railway Co.*, 1 *Drewry & Sm.* 154; *Vermont v. Boston, &c., Railway*, 25 *Vt.* 441.

✓ 15. There can be no injunction until the rights of the complainants are settled at law. A *quo warranto* would be a remedy at law.

Morris & Essex Railroad v. Pruden, 5 *C. E. Green*, 537; *The Hackensack Improvement Commission v. Midland* .

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Railway Co., ante p. 94; Treadwell v. Salisbury Man. Co., 7 Gray 399.

16. There are two main propositions in this case which have been discussed, and which can be answered affirmatively, and the others enforce and illustrate them.

1. Had the legislature of New Jersey the constitutional power to pass the act of March 17th, 1870? 2. Does that act authorize this lease?

Under these propositions the lease is good against the state as well as the complainants.

Mr. Browning, for complainants.

The learned counsel who immediately preceded me has stated to your honor, that more than two-thirds in value of all the stockholders have assented to the execution of the lease in question. He mentions this, of course, as a fact, to have some influence upon the court. He does not state, however, nor pretend that when the bill was filed, or when the answer of the corporate defendants was put in, such was the condition of things. But simply stated, as I understood him, that the fact is so now.

This statement is in no sense responsive to the bill; and, therefore, in this case, as it now stands, is entitled to no consideration; however true in fact. But I go further—fearing that silence may be regarded as acquiescence in the truth of the statement—and put in a rejoinder. For, although the learned gentleman may, and no doubt does, so understand it, as a simple fact; yet when the proper time shall arrive, we will maintain that, as yet, there has been no *legal* consent of any of the stockholders. That the assents referred to have been procured by personal application to the individual stockholders; and not upon duly convened meetings of the stockholders, after full and fair representation to, and consideration by them. And that assent to such a paper, cannot be legally and properly obtained, by sending emissaries around the country to the several stockholders, men and women, and obtaining their

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signatures to a prepared written assent, at best but imperfectly understood, upon such representations as the emissary may choose to make.

The relation of trustee and *cestui que trust*, exists between the directors of these companies and the stockholders; and before trustees can acquire an assent of their *cestuis que trust*, to a contract which is to deprive them of both their property and trustees, by transferring it to another set of trustees, for a different use, they should be convened, and the contract fairly and fully explained, and all the information touching it imparted to them, which the trustees themselves possessed, to avoid all misrepresentation and unfairness. The simple application of this rule, if it would not dispose of the whole list of assents to which the gentleman refers, would clearly exonerate the complainants, and all others of the stockholders, who have not understandingly and with a full knowledge of all material facts, actually signed the assent. *Shortz v. Unangst*, 3 *Watts & Serg.* 52.

The counsel here, by way of preliminary to a discussion of the questions involved, directed the attention of the court to the character and value of the property proposed to be leased; the title of the companies to this property; and the interest and estate of the state therein. He then proceeded—

I.

The only statutory authority conferred upon the United Companies to execute the lease in question, so far as New Jersey is concerned, is the act of March 17th, 1870.

It is entitled “An act to enable the United Railway and Canal Companies to consolidate their stock, and to consolidate or connect with other companies.”

The enacting clause is as follows: “Be it enacted by the Senate and General Assembly of the state of New Jersey, That it shall and may be lawful for the said United Com-

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panies, by and with the consent of two-thirds in interest of the stockholders of each, expressed in writing, and duly authenticated by affidavits, and filed in the office of the Secretary of State, to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company or companies in this state or otherwise, with which they are or may be identified in interest, or whose works shall form, with their own, continuous or connected lines, or to make such other arrangements for connection or consolidation of business with any such company or companies, by agreement, contract, lease, or otherwise, as to the directors of said United Companies may seem expedient."

The second proviso in this section is: "Provided further, That no such consolidation, agreement, contract, lease, or other arrangement, shall have the effect or be construed to release or discharge the said United Companies, or any or either of them, or any company or companies with which any such consolidation, agreement, contract, or lease may be made, from any taxes, liabilities, obligations, or duties which they or either of them may be subject or liable to, either to this state or to any other person or persons."

Admitting, for the present, that this act is valid and binding upon those corporations, respectively, and upon their stockholders, then, as a mere matter of construction, my proposition is,

1. *That it does not authorize the making of the lease in question, by the United Companies, to the Pennsylvania Railroad Company, a foreign corporation not mentioned in the statute.*

It proposes to confer on existing private corporations, new and important powers, not existing at common law, or included in their charters, or prior supplements. In such cases, and in all cases of legislative grants to private corporations, the well established rule of construction I take to be this: That grants to private corporations shall be construed, strictly, against the grantees; and to prevail they must be express and clear beyond a doubt; a doubt defeats

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the power. Like a doubt in criminal cases, it acquits the accused; and it is the duty of the court to direct an acquittal. In other words, what is not granted, in clear and unequivocal language, is withheld.

2 *Dwarris on Stat.* 750; 2 *Redf. on Railw.*, pp. 445–6, § 233; *C. & A. R. Co. v. Briggs*, 2 *Zab.* 623, 641, 647; *Townsend v. Brown*, 4 *Zab.* 80, 87; *Leggett v. N. J. Man'f. Co.*, *Saxt.* 541, 550; *Bridge Co. v. Land and Imp. Co.*, 2 *Beas.* 81, 94; *S. C.*, *Ibid.* 556; *Joint Co.'s v. R. & Del. Bay R. Co.*, 1 *C. E. Green* 321, 372; *Morris Canal Co. v. Central R. Co.*, *Ibid.* 419, 436; *Mor. & Essex R. Co.*, *v. Sussex R. Co.*, 5 *C. E. Green*, 542, 562; *Nix. Dig.* 168, § 3; *Packer v. S. & Erie R. Co.*, 7 *Harris* 218; *Bank of Penn. v. Comm.*, *Ibid.* 152; *Penn. R. Co. v. Canal Com's*, 9 *Harris* 10, 22; *Comm. v. Franklin Canal Co.*, *Ibid.* 125, 138; *Comm. v. Erie R. Co.*, 3 *Casey* 351.

I confine my authorities, except the elementary books first mentioned, to this state, and the state of Pennsylvania. So far as I know, the same rule, in substance, prevails everywhere. And I limit my reading to the New Jersey and Pennsylvania cases, assuming that the rulings in them will govern the court in this case.

In the case of *Leggett v. The New Jersey Manufacturing Company*, Chancellor Vroom, in 1832, said: "I concur in the opinion of the Supreme Court of the United States, as pronounced by Justice McLean, in the case of *Beatty v. The Lessee of Knowles*, 4 *Pet.* 168, that a corporation is strictly limited to the exercise of the powers specifically conferred on it; and that the exercise of corporate franchises, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." *Saxt.* 550. And Chancellor Halsted, in the case of the *Camden and Amboy Railroad Company v. Briggs*, decided by our Court of Errors, in 1850, says it is a "familiar principle, that a corporation, being a creature of law, has just such rights and powers as the law creating it gives it, and no other." 2 *Zab.* 641. And Justice Randolph, in the same case, said: "In

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questions arising on canal and railroad charters, as to the right to take freight or toll, or the quantity thereof, courts have uniformly construed the charter in favor of the public, and most against the company." *Ibid.* 647. And Chief Justice Green, delivering the opinion of our Supreme Court, in the case of *Townsend v. Brown*, in 1853, says: "It is a rule of construction, no less wise than clear, that in all cases of public grants, the interpretation shall be most favorable to the public, and most strongly against the grantee. The rule is founded in wisdom. All experience teaches that public rights are yielded to private interests with sufficient alacrity. If the legislature really design to grant to individuals the right of several fishery, below low-water mark, it is easy to do so, in plain and express terms. It is far better that the right should be unequivocally settled by legislative interference, than that public rights should be frittered away by the aid of judicial construction." 4 *Zab.* 87.

In a later case, decided by the same distinguished jurist, in 1860, as Chancellor, against the claim of a bridge company, to the exclusive right of a bridge over the Hackensack river, within certain prescribed limits, designated in its charter, he said: "Public grants are to be strictly construed. Contrary to the rule adopted in the case of private contracts, they are to be taken most strongly against the grantee, and in favor of the public. If there be a doubt as to the extent of the grant, the doubt is resolved in favor of the public. This is especially true of all grants which, like the present, narrow the powers, or abridge the functions of government. This grant is in derogation of public right. It restrains the sovereign power. It narrows the exercise of the great duty which the sovereign owes the people, of furnishing convenient highways." On this rule, where the exclusive right of a bridge had been clearly and expressly granted, by our legislature in 1790, he held that a railroad bridge, across the Hackensack, over which thousands of persons and hundreds of tons of merchandise were daily

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carried, was not a bridge within the meaning of the grant. And our Court of Errors, on appeal, affirmed the decree, on that rule. *Bridge Co. v. Hob. Land & Imp. Co.*, 2 *Beas.* 94 and 503.

In the still later case of the Joint Companies v. the Raritan and Delaware Bay Railroad Company, decided by the same very learned Chancellor, in 1863, he said: "It is a well settled rule of construction, that public grants are to be construed strictly; and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is, that any ambiguity in the terms of the contract, must operate against the corporation, and in favor of the public. The corporation take nothing that is not clearly given by the act." 1 *C. E. Green* 372.

At a later period, in the same year, Master Wilson, sitting for the Chancellor, in the case of the Morris Canal and Banking Company v. the Central Railroad Company of New Jersey, stated the same rule, equally strong and clear. "It is a well settled rule of construction," says the Master, "in regard to a public grant, that the grantee can take nothing not clearly given him by the grant. In case of doubt, the grant is construed in favor of the state, and most strongly against the grantee." *Ibid.* 436.

Nothing can more fully establish the rule as I claim it, than these cases—that public grants, to private corporations, must be express and clear. A doubt defeats the claim. Whatever is not clearly and expressly granted, is withheld.

This rule is no less clearly and firmly established, and acted upon, in the state of Pennsylvania. On this point, the courts in that state "give no uncertain sound." If possible, they lay down the rule more strongly, and adhere to it more rigidly, than we have done.

In the case reported in 7 *Harris* 218, of *Packer v. The Sunbury & Erie R. Co.*, the Chief Justice of that state, delivering the opinion of the Supreme Court, says: "All acts of incorporation, and acts extending the privilege of incorporated bodies, are to be taken most strongly against the

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companies. Whatever is not expressly and unequivocally granted in such acts, is taken to have been withheld." Again, on page 152, in the same book, in the case of the *Pennsylvania Bank v. the Commonwealth*, the Chief Justice illuminates the rule, and exposes the great dangers which require an unflinching adherence to it. "If," says he, "acts of incorporation are to be so construed as to make them imply grants of privileges, immunities and exemptions, which are not expressly given, every company of adventurers may carry what they wish, without letting the legislature know their designs. Charters would be framed in doubtful, or ambiguous language, on purpose to deceive those who grant them; and laws, which seem perfectly harmless on their face, and which plain men would suppose to mean no more than what they say, might be converted into engines of infinite mischief. The legislature, without knowing or intending it, might be thus induced to disarm the state of its most necessary powers and transfer them to corporations. The continued existence of a government, under such circumstances, would not be of much value. There is no safety to the public interests, except in the rule which declares that the privileges not expressly granted in a charter are withheld."

In the subsequent case of *The Pennsylvania Railroad Company v. The Canal Commissioners*, the same learned judge repeats the rule, as follows: "Corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature, in a manner too plain to be misunderstood. When the state means to clothe a corporate body with a portion of her sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so, that we will never believe it to be meant when it is not so said. Words of equivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they should be treated as nugatory when they do find their

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way into the enactments of the legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This court has asserted it times without number." 9 *Harris* 22. And still again: in the same book, in the case of *The Commonwealth v. The Franklin and Erie Canal Company*, the same learned judge reiterates the rule, with emphasis. *Ibid.* 128.

In the case of *The Commonwealth v. The Erie and Northeast Railroad Company*, the same judge sums up the rule. "This case," says he, "requires us to give a construction to the charter of a private corporation. The frequency of such cases excites some surprise, when we reflect that an act of incorporation is, and always must be, interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation, it may do; beyond that, all its acts are illegal, and the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner, are withheld.

* * * If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim. A doubtful charter does not exist; because, whatever is doubtful is decisively against the corporation." 3 *Casey* 351.

The undeniable rule, then, of construing legislative grants to private corporations—admitted and acted upon everywhere, and no where more firmly and fully than in this state and in Pennsylvania—is simply, that to prevail they must be expressed in such plain and unambiguous language as to admit of no doubt; for doubt defeats the grant. Or, in terser phrase, all corporate powers not so granted are withheld.

This rule of construing corporate grants must, and I think

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will, control the action of this court, not only because it is a rule of law, founded in wisdom and authoritatively admitted in our own courts, but because, if possible, it is made still more imperative by special enactment in our act concerning corporations. It has been for more than twenty-five years the statute law of this state.

2. Keeping, then, this rule in view, I respectfully submit, in the first place, that the power granted to the United Companies by the act of 1870, to consolidate, contract, or lease, is confined to canal and railroad companies in this state; and that it does not extend to the Pennsylvania Railroad Company, which is averred in the bill, and admitted in the answer, to be purely a foreign corporation.

In this regard, the substance of the enactment is, that it shall be lawful for said United Companies to consolidate their [own] respective capital stocks; or to consolidate [their own respective capital stocks,] with the stocks of any other railroad or canal company or companies, in this state; or, *otherwise*, make such other arrangements for connection or consolidation of business with any such company or companies, by agreement, contract, lease, or otherwise, as to the directors may seem expedient.

It is obvious that the arrangement of the subordinate sentences of the act, is not a lucid one; and, also, that the punctuation is imperfect and inaccurate. These defects, in a critical reading of it, must then, of necessity, be supplied.

In my reading, I do this; omitting, at the same time, those portions of the enactment which have no relation to the point now being discussed, and supplying in brackets, the necessarily implied portions of the sentences. This reading, in my judgment, brings out the true intent of the legislature, to be gathered from the words of the act. It limits the power granted, to domestic corporations—corporations “in this state;” and gives to the word “otherwise,” about which the contention is, its proper meaning of qualifying the word “make,” which relates back to its correlative verb, “consolidate,” so as to authorize other arrangements besides

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a consolidation of stocks, viz. "any arrangements for connection or consolidation of business," as distinguished from a union of stocks.

Precisely the same interpretation of the word "otherwise" would be effected by simply transposing it from its present place, where it is senseless, to that immediately after the second "consolidate" in the section. It would then read "or to consolidate, or otherwise, with any other railroad or canal company or companies in this state;" and would perform its proper office, by directly qualifying the verb "consolidate," instead of doing so, indirectly, as the correlative of the verb "make," as I have already suggested.

While this construction of the statute will give to every word its proper signification, it will also confine the operation of the court to its legitimate province—the interpretation of statutes, instead of the making of them. The word in question would be given its proper meaning, instead of an entirely different one; or else, as proposed by the last learned counsel who addressed the court, instead of standing for itself, would have some half dozen words added to it. The one mode would be the substitution, for the word used by the legislature, "otherwise," having a specific and known meaning, an entirely different word, "elsewhere," having also a well known, but entirely different meaning; or else it would be adding to it a number of other words, not necessarily implied to effect any expressed, or declared intention of the legislature. This would not be expounding laws, the legitimate province of a court; but the making of them, the legitimate province of the legislature. A sheer usurpation of legislative power by the judicial. This is never permissible; much less is it not allowed, to eke out a corporate grant, which can only be made by clear and express words; and not being so made, is positively withheld.

My reading effects, too, the three obvious objects of the act. First, to authorize a consolidation of the stocks of the United Companies, which had not been done by the agreement of 1867: Second, to authorize the United Companies

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to consolidate their stock, with the stocks of other companies in this state: and Third, to authorize the consolidation, or other arrangement or connection of business, with such companies.

See *Dwarris on Stat.* 702, '4, '7, '8, '9, '11 and '20; *Sedg. on St. and Cons. Law*, 260, 261; *Smith* 629, § 481; *Forest v. Forest*, 10 *Barb. S. C., Rep.* 46, 48; *Jones v. Smart*, 1 *T. R.* 42.

In this last case, Mr. Justice Buller completely overthrows my learned friends' differing modes of construction, by striking out and substituting, or interpolating words. "We are bound," he says, "to take the act of parliament as they have made it. A *casus omissus* can, in no case, be supplied by a court of law; for that would be to make laws." To which I take leave to add, a *multo fortiori*, we cannot so make corporate grants.

The intention of the legislature to limit the arrangements authorized to domestic corporations, appears very clearly, in the second proviso to this section; which I have already read. The object of the proviso was to avoid giving sanction to any contract, by the United Companies, with any other company with which they were authorized to contract, which would release either party from taxation, or any obligation by them to this state. "Provided further," says the legislature, "that no such consolidation, &c., shall have the effect, or be construed to release or discharge the United Companies, or any or either of them, or any company or companies, with which any such consolidation, &c., may be made, from any taxes, liabilities, obligations or duties, which they, or either of them, may be subject or liable to, either to this state or to any other person or persons."

It is obvious, that the companies with which the United Companies were authorized to contract, were *such* companies as the legislature had the power to tax, and which were subject "to liabilities, obligations, and duties" to this state. As no foreign corporation was subject to taxation, or owed any liability, obligation, or duty to this state, the legislature

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could not have had reference to such a corporation; and consequently, intended that contracts should be made only with *domestic* corporations; to which the jurisdiction of New Jersey extended, and which, only, were liable to her.

Again, the “effects and consequences” of the construction contended for, is a proper subject of consideration. It certainly cannot be—and ought not to be—the established policy of this state, to extend the almost unlimited power of consolidation and contract to the corporations of this state, with foreign corporations, anywhere and everywhere. And if, as in this case, the United Companies have had granted to them such power as contended, it is very easy to see that all the other railroad and canal corporations will, sooner or later, procure like powers. The sovereign attributes or franchises of the state, vested in them for the public good of the people of the state, will soon become cheap articles of merchandise, everywhere. If, to carry the grant now claimed, “otherwise” can be stricken out of the statute, and “elsewhere” inserted, or its simple, known, and acknowledged meaning can be perverted to mean what it does not in truth mean—that is, if, by judicial construction, to strain a more than doubtful public grant to a private corporation, “otherwise” can be made to mean “otherwhere,” or “elsewhere;” then the power of consolidation and arrangement, granted to the United Companies, becomes territorially unlimited. It will be made to extend, not only into every state in this Union, but to every nation in the world—England, France, China, and Japan; provided they can, by arrangement, get up some “identity of interest” with a railroad or canal company in either of those countries. “Otherwise,” or “elsewhere,” unlimited, is “everywhere,” except in the places previously named. Such legislation cannot be presumed. It would degrade the state. The impression of stupidity, or artifice, could not be avoided.

It cannot be denied that the powers here granted, even if limited to our own state corporations, are certainly extra-

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ordinary. Any contract for consolidation or arrangement of business, however exceptional, is sanctioned in advance. But if extended to foreign corporations, our most important highways, without knowledge or notice to any one but the parties, by simple contract, may pass into the ownership and control of these corporations; and through them, to the states creating them. The contract is irrevocable. What, then, becomes of the control which every state ought to have over its own highways?

Is not the power contended for, if granted, a most important legislative grant to a private corporation? Is not this interpretation on which the claim is based, at least a doubtful one? This is all I ask. Doubt defeats the claim. All corporate franchises, which are not expressly granted in language so clear and unmistakable as to repel every doubt, are withheld. This is the law of both New Jersey and Pennsylvania, or the maxim of *stare decisis* is a mockery.

3. But if this court shall hold that the act does authorize the United Companies to consolidate with or lease their works to a foreign corporation, it must yet be such foreign corporation as is "identified in interest" with them; "or whose works form, with the works of the United Companies, continuous or connected lines."

Here, again, we are in the region of conjecture. What constitutes an "identity of interest" between two railroad or canal companies? or what constitutes continuous or connected lines of their works? it is utterly impossible to determine. Identity is sameness. Must it be a sameness, or harmony of interest throughout? or will any one or two interests in common, and all others conflicting, be an identity within the act? Or may they, for the purpose of creating an identity of interest, first make a business arrangement which would, in the same sense, unite all or some portion of their business, and then calling that "an identity of interest," rely on it to justify a consolidation or lease? Must their works, to be continuous, continue in the same, or nearly the same direction? or are they continuous, what-

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ever may be their respective directions, simply because you can get from one to the other, and then continue on to some other place, without regard to course? And to constitute connection must their works join, so as to pass immediately from one to the other? or may they be connected by the intervening works of other companies, so that the works of others, which actually separate them, legally connect them? And if so, how many miles of intervening railroads or canals would be simply a connection? and how many would create a separation? or where would connection, by intervening roads, end, and separation begin? These are all questions much more easily put than answered. And because they are so difficult to answer as to create doubt upon the well established rule already stated, no corporate grant can be predicated upon them.

The complainants aver that there is no identity of interest between the United Companies and the Pennsylvania Railroad Company; but that, on the contrary, they are rival companies, having hostile interests; and that this pretended lease is resorted to to assuage hostilities. The only answer to this averment is, that there is an identity of interest; because there is a contract or arrangement, between the parties, by which the New York passengers and freight, brought by the Pennsylvania Company to Philadelphia, are transferred over the intervening works of other companies to the works of the United Companies at Trenton, and thence to New York, for an agreed compensation. This is a simple arrangement, touching through freight and passengers, similar, in substance, to the forwarding contracts between railroads all over the country: and I deny that it constitutes the "identity of interest," contemplated by the act. If so, an "identity of interest" exists between all the railroads of the country, where passengers and freight are, directly or indirectly, transferred from one to the other; and the act would justify consolidation with any railroad or canal company, with which any such arrangement had been, or should be made.

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4. Again, the act requires that the works of the company to be consolidated with, must form a continuous or connected line with the works of the United Companies. The exact language of the act is, "Whose works shall form with their own [*i. e.* the works of the United Companies,] continuous or connected lines."

The condition required is, that the "works" of the contracting parties shall be "continuous or connected;" not their "works," by the aid or intervention of the works of other companies; but their works, only, of themselves. And it is the "works," that is their railroads or canals, physically; not a mere business connection, or continuity of travel or traffic. It is very clear, I think, that the act requires the continuity or connection to be a physical one; and to connect immediately, and not indirectly, by intervening works or lines. It was so held in Pennsylvania, as I am informed, under similar language in their act of March, 1859, and the defect was cured by the act of 1861.

Now, the complainants in their bill aver, that there is no connection or continuity of "works;" and they explain how they are separated. That the works of the United Companies have their westerly termini at Trenton, Bordentown, and Camden; that the works of the Pennsylvania Railroad Company have their easterly termini at Mantua, in that state, and on the west side of the Delaware, below Philadelphia; and that the works of the contracting parties were, necessarily, separated by the intervening works of other companies, between Trenton and Mantua, on the one hand, and by the river Delaware on the other. This physical separation is admitted in the answer of the corporate defendants, and by their counsel in argument. But, it is contended that, because the United Companies, by ownership of a majority of the stocks of the intervening bridge and railroad companies between Trenton and Mantua, can and do control those companies, and transport passengers and merchandise to Mantua; and also, from the mouth of the canal at Bordentown, and from the westerly terminus of the Camden

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and Amboy Railroad at Camden, down the river, to the Delaware spur of the Pennsylvania road, below Philadelphia, and that in this way a *business* connection and continuity of traffic exists between the contracting parties, within the intent of the act.

This insistent of counsel admits, that there is no direct and actual continuity and connection of the "works" of the United Companies, with the works of the Pennsylvania Company; which, in my judgment, and as I respectfully submit, admits that there is no such connection as the act requires. The "works" of the companies are to be "continuous or connected;" not the *business or traffic*, over other works and natural highways. The works of other companies, and the Delaware river, which actually separate them, cannot, truthfully, be said to "connect" them. The same things cannot perform directly opposite functions at the same time. Upon this principle, the works of the United Companies "form continuous and connected lines," with one-half the railroads and canals in the United States, and all the lands, on either side of the Delaware, and thereby separated, would still be connected by it! And in like manner, the New Jersey Railroad, by having its northern terminus on the Hudson, opposite New York, would "form a continuous and connected line" with all the railroads which terminate at that city and its surrounding waters; and would be *connected* with the railroads in Europe by the Atlantic ocean!

The truth is, there is no such connection or continuity of the works of the contracting parties as the act obviously requires; and sophistry can not prove to exist that which does not exist.

I respectfully submit that, by no proper rules for construing statutes, can our act of 1870 be held to authorize the execution of the lease in question. Much less can it be so construed, upon the established rules for construing public grants to private corporations, by which doubt defeats the grant.

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II.

In the next place, I submit that the act of March 17th, 1870, if it is to be construed as authorizing the United Companies to make the lease in question, is, as against dissenting stockholders of the United Companies, invalid.

As preliminary to discussing this general proposition, I call attention to the statements in the bill, touching the charters of those companies.

They were granted in 1830 and 1832, before the passage of our act of 1846, and without any reservation to the legislature of the power to alter or repeal. They are, therefore, irrepealable, except in the exercise of eminent domain. These facts are stated in the bill and admitted in the answer, which denies only the conclusions of law.

I also call attention to some of the familiar provisions of those charters, to the effect; that, for constructing the works of the companies, the moneys shall be raised and paid by the stockholders, upon subscriptions to the capital stock; that the shares shall be personal estate; that the lands across which the works shall be located may be taken from the owners at an appraised value by condemnation; that the works, when completed, shall be public highways; that the state, at the expiration of thirty years after their completion, may take them at an appraised value, not exceeding cost; that this reserved power in the state to take the works by subsequent supplements, has since been extended to the year 1889; that the affairs of the companies are to be managed by respective boards of directors, to be annually chosen by the stockholders; and that the net profits of the works shall be periodically distributed to the stockholders. These are, most of them, the ordinary provisions in our charters, and are provisions in these.

They are organic provisions; in reference to which the charters were accepted, the companies organized, the subscriptions to the stock made and paid, the works constructed,

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and they are, in part at least, the considerations of the implied contracts between the state and the corporations, and between the corporations and their stockholders.

In the granting and accepting of every private charter, there is, incidental to it, an implied contract between the state and corporation, that, unless forfeited for some wrongful act or omission, it shall have and hold all the corporate powers and franchises granted, according to the provisions of its charter. If unlimited, the grant is perpetual. If limited, then it is taken subject to the limitations, whatever they may be. This contract, like every other valid contract, on principles of universal law, is irrevocable, except by the parties to it or their representatives. The one cannot do it without the other. And, under our constitutional forms of government, it is sacredly protected against legislative violation, by the provision in the Constitution of the United States, that no state shall pass any "law impairing the obligation of contracts." And, also, by the similar provision in the Constitution of this state, that our legislature shall not pass any "law impairing the obligation of contracts." The language is precisely the same in each. The one is a paramount prohibition on all the states; the other is a prohibition of the people of this state upon their own legislature. It is, on this principle of universal law (that contracts are, in their nature, irrevocable, except by the consent of the parties to them), protected from violation by the two-fold constitutional prohibitions mentioned, that no state of this Union, after having granted a charter to a private corporation, without limitation or reservation, can repeal or alter it in any of its material parts, without the consent of the corporation, the other party to the contract.

There is, also, in the accepting of every private charter of incorporation, and the organization by the stockholders under it, an implied contract between the corporation itself and its stockholders, to the effect that none of the powers or franchises of the corporation, or any of its corporate property, shall be applied or used, to or for any other object or

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purpose than those contemplated or authorized by the charter. The charter constitutes the articles of the corporation partnership entered into, limiting its business to the objects contemplated; and the powers and funds of the partners can be properly applied to no other business. Any other application of them is illegal, outside of the contract, *ultra vires*, and liable to be restrained or set aside. This contract is also inviolable, for the same reason; and protected, in the same way, as the contract between the state and corporation.

I. In considering the general proposition—that the act of 1870 is void against dissenting stockholders—my first subordinate proposition is, that the organic provisions of the charters of the United Companies are irrepealable and unalterable, either directly by the state, or indirectly by the directors, under legislative sanction, without the consent of the companies and their stockholders, on the ground that such alteration would impair the obligation of the implied contracts contained in the granting of their charters, contrary to the Constitution of this state, and of the United States. *Const. U. S., Art. I, § 10; N. J. Const., Art. IV, § 7, pl. 3.*

It is unnecessary to argue before this court, that what the legislature cannot do directly it cannot do indirectly. In other words, that it cannot authorize others to do what it is unable to do itself.

The legislature cannot repeal or materially alter the charters of private corporations, without the consent of the companies and their stockholders. *A. & A. on Corp., § 767*, and cases cited.

I refer, specially, to some of the cases in this state, because they are authoritative on the action of this court.

The case of *Glover v. Powell*, decided by Chancellor Williamson in 1854, was touching an act which authorized the cutting of a dam, without the consent of the meadow owners, across the mouth of Little Timber creek, in Camden county, which had been made by a meadow corporation, created in

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1760. In reference to that act the learned Chancellor said : "The act of the legislature, passed the 17th March, 1854, which authorizes and requires the township committee of the township of Union to remove the dam, is in violation of the Constitution of the United States, which declares that no state shall pass * * any law impairing the obligation of contracts. * * * In the Dartmouth College case, Justice Story remarks : ' A grant of a franchise is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation when the grant was completed and accepted by the grantors, it involved a contract that the grantees should hold, and the grantors should not resume the grant, as much as if it had been founded on the most valuable consideration.' * * * It is in violation of good faith ; it impairs the obligation of a contract which has been enjoyed to the mutual benefit of both parties ; and it is, therefore, repugnant to the Constitution of the United States. It is in direct conflict with repeated judicial decisions, declaring similar acts void." 2 *Stockt.* 211, 228, '9.

In the case of the Joint Companies v. the Raritan and Delaware Bay Railroad Company, in 1863, Chancellor Green said, in reference to the franchises of those companies : "The right of an incorporated company to be protected in the enjoyment of their franchises, and the duty of the court of equity, by the exercise of its restraining power, to afford such protection, are familiar doctrines of this court. These principles have been so often declared, and are so constantly recognized in practice, as to render their re-affirmance, or the citation of authorities in their support, an unnecessary formality. They are freely conceded as the recognized law of the court." 1 *C. E. Green* 361.

The decree of the Chancellor, based on this doctrine, was affirmed on appeal to the Court of Errors. 3 *Ibid.* 565.

And in the more recent case, to which I shall have occasion again to revert, of *Zabriskie v. the Hackensack and New York Railroad Company*, your honor, holding this court,

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said: "Since the Dartmouth College case, in the Supreme Court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the state courts, that a charter granted by the legislature to a corporation, is a contract between the state and the corporators; and that the state can pass no act to take away or impair any of the franchises or privileges granted by it." 3 *C. E. Green* 183.

These New Jersey cases will be acknowledged as authority by this court. They require no argument to apply them.

II. My second subordinate proposition is, that the act of 1870 is void as against the *complainants*, at least; because it attempts to grant new and extraordinary powers to the directors, by contracts with other corporations, materially to alter the charters of the United Companies; to vest the property and control of all their corporate franchises and property in those corporations; to limit the income of the stockholders to a fixed rent instead of the total earnings; and, in fact, practically to annihilate the United Companies themselves; and yet that act has never been accepted, either by said United Companies, in their corporate capacity, nor by their respective stockholders.

In considering this proposition, I lay out of view the claimed consent of two-thirds in interest of the stockholders, because such allegation is, in no sense, responsive to the bill, and is now denied by the complainants. It cannot, therefore, be considered on this motion for an injunction, on bill and answer alone.

1. In support of this proposition, I first direct your honor's attention to the fact, that the non-acceptance of the act by the companies and the stockholders, and the positive dissent to it by the complainants, is expressly averred in the bill.

Besides the general oath of all the complainants to the truth of the bill, each has, by special affidavit, sworn or affirmed that he has never, in any way, assented to the act; and that they respectively believe that it has never been

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accepted by, or presented to the directors or stockholders of either company for acceptance. Mr. Forker, one of the complainants, in his affidavit, swears that at a joint meeting of all the directors, they refused to call a meeting of the stockholders ; and that no meeting has ever been called.

The only answer to the averments in the bill, and affidavits annexed, is to the effect that the act was submitted to the joint meeting, or joint board of directors, consisting of the directors of all the boards, and accepted by a large majority of the joint board ; and that the stockholders of the several United Companies, on personal solicitation, to the extent of two-thirds in value, have consented to the act. But when, or in what form the assent of even the joint board was given, or the assent of the individual stockholders, is not stated or made to appear, except by the resolution of the joint board, recommending the leasing of the works to the Pennsylvania Railroad Company for nine hundred and ninety-nine years ; and by the production of some rolls of paper, which counsel say contains the assent of two-thirds in value of the stockholders to the lease.

Suppose all this to be true (which is more than apocryphal), yet it is no consent to the act of 1870. It would be, at most, but a simple consent to the execution of the lease to the Pennsylvania Railroad Company—the performance of a single act of assumed power under the statute—not an acceptance of the statute itself as a part of their charters, under and by virtue of which the directors may go on, indefinitely, in contracting and uncontracting, with pretty much all the railroad and canal corporations in the world ! The act, I respectfully submit, must be accepted in whole, and in fact, so as to become, in all its parts, a portion of the charters, under and by virtue of which the powers of contracting, conferred by it on the directors, can be repeated at pleasure, or else not at all. It cannot be accepted or used to justify a single contract under it, and then held in abeyance or rejected, as to all others.

But I deny that the joint board, as such, has any power

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whatever. either to consent or dissent to the act. It has not, and cannot have, any power to consent to an alteration of the charters of the respective companies, much less to their surrender or annihilation. If it has such powers, where and how did it acquire them? We have not been advised of this, as yet, either by the answer or arguments of defendants' counsel.

But again: the answer of the defendants is in no sense responsive to the bill. The bill avers "that the said act has never been submitted to the board of directors of *either of the said United Companies, or to the stockholders of either* for acceptance; nor has it ever been accepted or acquiesced in by either of said companies. There is no averment in the bill that the act had never been presented to, or accepted by, the joint board of directors; nor that it had never, on personal solicitation, been presented to or accepted by two-thirds in value of the stockholders. The bill charges that the act had never been acted upon by the separate board of directors of either company; or by the stockholders, as a body, of either; or accepted or acquiesced in by the *complainants*. The omission to answer any of these charges is, upon this motion, an admission of their truth, and I shall so consider it.

2. The joint board of directors has no control over the organization, or life of either of the United Companies. The majority, or the whole, as such, of the joint board, have no power to alter the organism of the United Companies; much less to enter into contracts for their annihilation or dissolution. The article of agreement, uniting the United Companies, simply provides that the directors of the said companies "shall meet in joint board, * * and jointly transact, manage, and conduct the business of the parties hereto." It is simply a business meeting for directing the ordinary business of the companies; a kind of committee of the whole, with powers of general supervision. And the act of 1867 confirming this contract of union, expressly provides that "the *organization* and election of directors of the several

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companies, shall remain distinct; and the provisions of their respective charters, with all the restrictions and liabilities therein contained, except as necessarily modified by such consolidation, shall continue in force."

The joint board is no corporation; it has no common seal; no corporate powers or franchises; it represents no corporation. It is simply a joint meeting of the directors of the three companies, which, for the transaction of a common business in which they have, by a sort of corporation partnership, embarked, united themselves for the simple purpose of giving their united energies to that business. As a joint meeting, they have no more power over the constitutional organism of each other, or over the corporate existence of either of its members, than a firm, composed of three individuals, and can no more change, or destroy the separate physical existence of each other. It seems to me perfectly clear, that taking everything alleged in defendants' answer, the act of 1870 has never been in fact or legal effect, presented to or accepted by either of the United Companies, or the stockholders of either, much less to or by either of the complainants. It is, therefore, for the want of such acceptance, no part of the charters of either of the United Companies, and void. No law.

The charters of the United Companies were passed some fifteen years before the passage of our general act of 1846, concerning corporations; which enacts, in substance, that the charter of every corporation *thereafter* granted, shall be subject to alteration, suspension and repeal, in the discretion of the legislature. Two of the charters were granted in 1831, and the other in 1832. They are not, therefore, affected by that act.

Neither of the charters reserves any power to the legislature of alteration or repeal, and neither is subject to any limitation, except the power reserved to the state, to take the works at a prescribed time, now fixed in the year 1889, at an appraised value, not exceeding cost. Subject then only to this limitation in favor of the state, they are per-

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petual, and cannot be altered or repealed without the consent of the companies. The consent can only be made by some act or acts of the companies, amounting to an acceptance of the act altering their charters. The corporation or legal entity, and the stockholders, who are the corporators, together, constitute the companies. The corporation and its directors, or managers, hold the legal title to the franchises and corporate property, and are the trustees. The stockholders, whose money paid for the franchises and property, are the beneficial owners; the *cestuis que trust* for whose use the property is held and managed. The two—the trustees and *cestuis que trust*—holding together the whole estate, legal and equitable, are the company; and hence it is, that to constitute an acceptance to any alteration in the charter, they must both consent.

A. & A. on Corp., §§ 81–2 and cases cited. I refer also to *Lincoln & Ken. Bank v. Richardson*, 1 Maine 79; *Galena & Ch. R. Co. v. Appleby*, 28 Ill. 283; *M. River R. Co. v. Zimmer*, 20 Ill. 654; *Winter v. Muscogee R. Co.*, 11 Georgia 438.

These authorities fully sustain the point stated, that an acceptance by the corporation and stockholders to any material alteration in the charter of a private corporation is necessary. I, therefore, submit that for the want of such acceptance the act of 1870 is void.

III. Failing to convince the court that the acceptance of the act of 1870, by the respective United Companies and their stockholders is necessary, and that they have not accepted it; my next subordinate proposition is, that that act is void against the complainants, on the ground that it impairs the obligation of the implied contract between the United Companies and their stockholders, to the effect that none of their corporate franchises, powers or property shall be applied or used, to or for any object or purpose not contemplated or authorized by their charters, by authorizing or attempting to authorize (that being the construction of the act) the

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directors to execute the lease in question, without the consent of *all* the stockholders.

Assuming the existence of such a contract, without reference to the authorities with which the books are saturated, the question presented by the proposition is: Is it competent for the legislature to authorize the directors, with the consent of two-thirds only of the stockholders, to execute the lease in question?

It certainly is not competent for the legislature so to do, if such would impair the obligation of that contract; for the legislature is prohibited, both by the Constitution of this state and of the United States, from passing "any law impairing the obligation of contracts." What then is the contract?

It is a contract between the companies and their stockholders. Not with *two-thirds* of the stockholders, or any number less than the whole, but with all, every one; as much with one as the other. The contract is with them, jointly and severally. Each one is a contractor, as much as any other one, or all the stockholders; and on the faith of his contract, each one has invested his money, and that is the contract protected by the constitutional provisions to which I have referred, and to impair which would certainly be an infraction of those constitutions. A contract by A with B and C cannot be revoked or altered by A, with either B or C, without the other. The parties only, or their representatives, who made the contract, can unmake or alter it.

Again: the contract is that the corporate franchises, powers and property procured by the moneys of the stockholders, shall not be applied to any other objects or purposes than those provided for in their charters. The stockholders agree to embark or invest their money in a particular enterprise, specified and provided for in their charters. That is their contract. To use or apply their money, or the property procured by it, in any other enterprise, or any other way than contemplated in their charters, would be a violation of that contract—an impairing of it within the meaning of the Con-

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stitution. This the legislature is not competent to do, or authorize to be done, without the consent of all the stockholders; for the same reason that I have already stated, touching the other branch of the contract. The money and other property belong to the stockholders. Each has an estate in it in the ratio of his amount of stock, and neither can be deprived of his property without his own individual consent, any more than one of several joint tenants, or tenants in common of lands, can be deprived of his estate, however small, by the action or consent of any or all the others.

I submit, therefore, that upon the well established principles of the rights of property and constitutional law, it is not competent for the legislature to make, or authorize the directors of the United Companies to make, by contract or otherwise, any alterations in their charters, or apply the corporate franchises, powers and property to any other use or purpose than contemplated and provided for in their charters, without the consent of *all* their stockholders.

Having defined, and, to some extent, elucidated the character of the implied contract between an incorporated company and its stockholders, I proceed to discuss more particularly the question now being considered :

Is it competent for the legislature to authorize the directors of the United Companies, with the assent of two-thirds only of their stockholders, to execute the lease in question ?

1. The act of 1870 does not in terms direct or authorize the execution of the lease. It is in general terms, without express reference to any particular contract or company. But assuming what I have endeavored to disprove, that it can be *construed* to extend to the Pennsylvania Railroad Company, then it authorizes the United Companies to make with it, for connection or consolidation of their business, such "agreement, contract, lease or otherwise," as they may deem expedient. Under this general power, those directors propose to execute the lease in question. This brings up the question stated.

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It is too clear to require argument or reference to authorities to prove or establish before this court, that if the legislature could not, by direct enactment, direct or authorize the execution of the lease, it cannot do so indirectly by giving authority to the United Companies. What it cannot do directly, it cannot authorize another to do. The question then is reduced to this: Can the legislature directly, by special enactment, authorize the directors of the United Companies, upon obtaining the consent of two-thirds of the stockholders, to execute the lease in question, against the dissent of the remaining stockholders, or any number of them? I maintain that it cannot.

2. There is no difference in principle between obtaining the consent of two-thirds of the stockholders and obtaining simply that of a majority of them. If two-thirds can control the other one-third, then upon the same principle a majority of the stockholders can control the minority. This is admitted by counsel on the other side. If a majority cannot control all the minority, it cannot control any of them; and I maintain, and I submit, that it is well settled upon principle and authority that it is not a question of majority or minority of the voices, or extent of interests, or opinions of stockholders, but a question of *property, without regard to value*, based on the contract of each individual stockholder with the corporation, as I have already defined it. Each one must answer for himself, and not any number, or all others of the stockholders, for him. His own *will* is the law; and his own estimate of value, and what he will do or have done with his own property, is a question belonging exclusively to himself. He can "do what he will with his own." It is his own property, and not the property of another, and he cannot be disturbed in its enjoyment, except in the exercise of the right of "eminent domain."

3. Before referring directly to the authorities sustaining this position, I have simply to suggest that if this is a right of property, based on the contract as I have stated it, between the stockholders and the corporation, then it is pro-

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tected by the constitutional prohibitions to which I have referred, from being impaired by the legislature; and, consequently, that the act of 1870, so far as it attempts to subject it to the control of two-thirds of the stockholders, is void.

“If a majority of a railway company obtain an alteration of their charter, which is fundamental, as to enable them to build an extension to their road, any shareholder who has not assented to the act may restrain the company from applying the funds of the original organization to the extension.” 1 *Redf. on Railw.* (4th ed.), p. 196; *Stevens v. R. & B. R. Co.*, 29 *Vt.* 562.

Touching the unconstitutionality of a law, so far as it interferes with the property right of each individual stockholder: see the opinion of Mr. Justice Davis, in the Supreme Court of the United States, in the case of *Clearwater v. Meredith*, 1 *Wall.* 39.

And upon this point your honor held that, even under a charter which reserved to the legislature the power “at any time to alter, modify, or repeal” the charter, it had no power, against the rights of a single dissenting stockholder, to authorize the use of the corporate franchises and powers to the extension of the road. *Zabriskie v. The Hack. & N. Y. R. Co.*, 3 *C. E. Green* 191–2.

It is perfectly clear, on principle and authority, that if the act, without the provision requiring the assent of two-thirds in value of the stockholders to authorize the contract, would be unconstitutional, it is equally so with it. The only question then is, whether the contract between the corporation and the stockholders, to the effect that the corporate franchises and property shall not be applied to any other than the objects and purposes contemplated and provided for in the charter, is *impliedly qualified*, so that a majority of the stockholders, as to such contracts, can control the minority? I now proceed to show that the whole scope of authority is against such qualification.

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4. The doctrine of *ultra vires* is more fully discussed in the first volume of Redfield on Railways, and the authorities, both in England and this country referred to, than in any book I have consulted.

He says: "There can be no doubt that subscribers to the stock of a railway company are released from their obligations to pay calls, by a fundamental alteration of their charter. This is so undeniable and so familiar a principle, in the general law of partnership, as not to require confirmation here. * * * Every owner of the shares expects and stipulates with the other owners, as a corporate body, to pay them his proportion of the expenses, which a majority may please to incur, in the prosecution of the particular objects of the corporation. To make a valid change in this special contract, as in any other, the consent of both parties is indispensable. * * * If a majority of a railway company obtain an alteration of their charter, which is fundamental, as to enable them to build an extension of their road, any shareholder who has not assented to the act, may restrain the company, by injunction, from applying the funds of the original organization to the extension." *P.* 196, § 56.

To the same effect is the doctrine laid down by *Angell & Ames on Corp.*, p. 414, § 391, and cases cited.

But, without multiplying special references to authorities in other states, I come directly to our own. I refer, first, to the familiar case, decided in 1853, of *Kean v. Johnston*, 1 *Stockt.* 401.

That was a case almost identical with the present, except that it was an attempt to directly amalgamate or consolidate two domestic corporations, under a special act, authorizing it by special reference to the corporations; instead of accomplishing the same thing, in substance, between the United Companies of this state, with a Pennsylvania corporation, indirectly, by a contract or lease, *under an act confirming, in advance, any contract or lease for consolidation or arrangement in business the said United Companies should*

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make. That case had the merit of candor. So much cannot be said, truthfully, of this.

A railroad, under a special charter, had been constructed from Elizabethtown to Somerville. Another company had been chartered by a different name, to construct another road from Somerville to the Delaware river, opposite Easton, in Pennsylvania. This company, by its charter, was specially authorized to purchase the Elizabethtown and Somerville road, so as to make a continuous line across the state; and that, on the purchase being effected, the two roads were to become consolidated into one, by the name of the Central Railroad Company of New Jersey. An agreement for the purchase was entered into between the companies; and Col. Kean, a single stockholder in the original road, filed his bill to set aside the agreement, and to restrain all further proceedings under it. The then Chancellor (Williamson) being interested, referred the case, on demurrer to the bill, to Master Parker, on whose opinion the demurrer was overruled. It was elaborately argued by able counsel.

The opinion of the master is of marked ability. I read a small portion of it, relating to the point now being considered.

Referring to the rights of the stockholders in the Elizabethtown road, the master says :

“As stockholders, they own the road in common, to be employed in specified uses. Each owns a share in the whole, and is to have a proportionate share in the profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road, and in every dollar it earns. The directors are their trustees, to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen, they may reap the contemplated profits; and this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine, within the scope of this mutual contract, they each agree to abide by; but there their mutual contract ends, and no majority, however large, has a

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right to divert one cent of the joint capital to any purpose not contemplated with, and growing out of this original, fundamental, joint intention." 1 *Stockt.* 407, 408.

But I come for the settlement of this fundamental principle, still more closely, and, if possible, more authoritatively, square into this court, held by the same distinguished jurist whom I now address; and I adopt his very language, in 1867, in the case of *Zabriskie v. The Hackensack and New York Railroad Company*.

"It is settled," says your Honor, "upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement, or become members of a corporation for definite purposes and objects specified in their charter, which, in such case, is their contract, and for a time settled by it, that the objects and business of the partnership or corporators cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter."

"This rule is founded on principle; the great principle of protecting every man and his property by contracts entered into; a guiding principle in all right legislation; and incorporated into the Constitution of the United States, and of almost every other state in the Union. And the rule is not changed, because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed." 3 *C. E. Green* 183, '4.

It is this inherent right of private property, which will not tolerate, without destruction, any qualification other than the right of eminent domain; doubly protected by constitutional prohibitions against legislative action; and thus enunciated in this house, in words worthy of being written in

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letters of gold ; on which I rely to arrest the contemplated sacrifice of the rights of private property, aimed at by the execution of the lease in question.

See also *Bank of Penn. v. Comm.*, 7 *Harris* 151.

In perfect harmony with the American decisions are those of England, in the appreciation and unswerving protection of this great principle of private property. All the leading English cases are referred to in the recent work of Hodges on Railways, not yet published in this country. See *pages* 61 to 81.

There is this distinction to be observed between the English cases and the American. Parliament is omnipotent, unrestrained by any actual constitutional prohibition ; so that, in case of an act of Parliament positively directing a thing to be done, it controls the courts. Hence, the English cases can harmonize with ours only where there is no such positive act.

With but very few exceptions, all the authorities in England and in this country, are to the effect that every shareholder in an incorporated company, when not otherwise specially provided in the charter, has a special property interest, founded upon contract, represented by his share of the stock, which, in law and equity, gives him a right to require the corporate property and franchises to be kept to the chartered uses of the corporation ; and that a Court of Chancery, on application by one, or any other number of the stockholders, will restrain their application to any other uses.

A single shareholder out of six hundred, having five hundred and ninety-nine against him, says Vice-Chancellor Kindersley, may come into a court of equity and restrain any unauthorized use of the corporate property or credit, however profitable the use, by simply saying, " that is not our contract among ourselves." 1 *Dr. & Sm.* 794. Master Parker, in the case of *Kean v. Johnston*, in this state, touching a case very much like the present, said : " Each shareholder may simply say, '*non haec in federa veni.*' " And your

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Honor, in the case of the Hackensack and New York Railroad, declared that "one partner, or corporator, however small his interest," is sufficient; and that the rule is founded on the great principle of protecting every man in the enjoyment of his property. And the Chief Justice of Pennsylvania shuts the door against every possible disregard of the rule, by averring that no judge who has a decent respect for the principle of *stare decisis*, can deny that it is immutably established. 7 *Harris* 151.

If it is settled that private corporations have no right or power to apply their corporate franchises and property to objects or purposes not contemplated and provided for in their charters; and that any stockholder can restrain any attempt so to apply them; it remains only to determine, on the point now being considered, whether the execution of the lease in question is within the objects and purposes contemplated and provided for in the charters of the United Companies.

The only objects and purposes of those companies, now considered as one company, and the only ones declared or provided for in their charters, were to make, maintain, and operate, across the state of New Jersey, a distance of about ninety miles, complete and expeditious lines of travel and transportation, by railroads and canal, between the cities of New York and Philadelphia; without any pretence of power or object of extending those lines, by contract or otherwise; or of co-operating in any scheme for the extension of those lines westward, across the state of Pennsylvania, three hundred miles, to Pittsburg; much less, across the continent of North America, three thousand miles, to the Pacific ocean. In the simple venture of traversing the state of New Jersey alone, and connecting those cities by railroad and canal, the stockholders of those companies embarked and invested their moneys upon the irrevocable contracts between them and the state, and between themselves and their respective companies, that their corporate powers and franchises should be confined to that business; and that they should have to

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their own use, *all* the proceeds and profits, whatever they might be, of that business; and that their funds, thus invested, should be confined to that business.

As a further security to this investment, the stockholders were to have the absolute possession, direction, and control of their own works, by boards of directors, to be chosen annually by themselves, and to be made more directly responsible to them, by such securities and by-laws as they might make and require. But it was not contemplated, in that scheme, that all their franchises and works, including all their other corporate property, now admitted to be of the value of fifty millions of dollars, under the pretence of a lease, should be practically assigned and sold out, for one thousand years, to the Pennsylvania Railroad Company, to take, for that period of time, all those franchises, works, and other property, into its absolute possession and control; and to maintain and operate those works, and dispose of all the other property and proceeds, except only a fixed rental or pension (call it what you please,) of two millions a year; thereby stripping those stockholders not only of all the care and control over their own property, but of all ability to pay or discharge their own debts to avoid absolute sacrifice of everything; and all this upon the naked covenant of a foreign corporation, over which this state has no jurisdiction, and that without the payment of a single dollar of purchase money, or giving any particle of security for the payment of the rental, or the performance of any other covenant contained in the lease! All this is now proposed to be done by simple contract, through the instrumentality of the lease in question. Execute it, if valid, and it is all accomplished, passed redemption. To argue that such an absolute breaking up, practical annihilation of the United Companies, would be beyond the objects and purposes contemplated in their charters, I should regard as a positive stultification of myself; and an implied stultification of this court. I shall, therefore, forbear, further than to refer to a few authorities.

The principal English cases as to what acts of corpora-

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tions, or its directors, will be regarded as *ultra vires*, beyond their strength, or outside of the proper objects or purposes of their charters, will be found collated and commented upon in *Hodges on Railw.*, pp. 61 to 71.

Shrewsbury & Bir. R. Co. v. Northwest. R. Co., 6 H. L. Cas. 113. This was a case where a lease was specially authorized by an act of Parliament upon the happening of a certain event. The bill was filed to restrain the execution of the lease before the happening of the prescribed event, *i. e.* the completion of three lines of railway.

The Lord Chancellor, in delivering the opinion of the court, said :

“If on the completion of one of the lines, the Shropshire Company had granted a lease, under its common seal, to the Northwestern Company, it would have been doing, or attempting to do, something *ultra vires*. A railway company certainly cannot grant a lease, except when it is authorized to do so by Parliament; and though, by the terms of the eleventh section, the Northwestern Company is entitled to the possession of each line as it shall be completed, paying a rent to the Shropshire Company, yet the Northwestern would hold strictly, not as lessee, deriving title under the Shropshire Company as lessor, *but by virtue of the special provisions of the act of Parliament*. I think, therefore, that inasmuch as the whole undertaking had not yet been completed, the time had not arrived when the Shropshire Company had authority to grant a lease.” P. 130.

This, it may be observed, is not only a case against the execution of a lease without special act of Parliament authorizing it; but it exhibits the requiring of a strict compliance with the act. As the whole three roads on which, literally, the power to execute the lease in question was given, had not been completed, the court restrained the execution of the lease, by *one* of the companies, whose road had been completed, and possession of it given to the lessee company, under the act, which was paying rent, not as *lessee*, but, as

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the Chancellor said, "by virtue of the special provisions of the act of Parliament."

Again, on page 136, the Lord Chancellor further said, in the same opinion: "The principle has often been recognized and acted upon in courts of law and equity. In the case of the East Anglian Railway Company v. The Eastern Counties Railway, it was held by the Court of Common Pleas, that no action could be maintained on the covenant of the defendants to accept a lease of the railways of the plaintiffs, to find the capital for constructing the railways, and to pay the costs of promoting certain bills, then pending in Parliament. The covenant was held to be void, being a covenant to do acts not within the objects of the corporation."

The East Anglian case, mentioned by the Lord Chancellor, (reported in 11 *Com. Bench* 775,) was a suit at law in the Common Pleas, on a contract to accept a lease. The contract was held to be *absolutely void*, because the lease would be *ultra vires*; beyond the corporate power of the company.

Both the English and American cases will be found referred to in 1 *Redf. on Railw.*, p. 588, ch. 22, sec. 1, and notes.

Troy & Rutland R. Co. v. Kerr, 17 *Barb.* 581. This was an action of the company against one of the subscribers to pay the instalments on his subscription to the stock. One of the grounds of the defence was, that he was released from payment by a lease of the road to another company. The court held that although the lease was absolutely void, yet that the mere execution of a void paper did not discharge the defendant from his subscription.

Ohio & Miss. R. Co. v. Ind. & Cinn. R., 14 *Am. Law Reg.* 733. This was an action on a contract, by plaintiff company with the defendant company, that upon certain considerations the plaintiff company would, in effect, lease [so construed by the court,] their road, or a particular use of it, to the defendant company. The court held the contract to be *absolutely void*. This case is closely applicable

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to the present, because the companies contracting, like the present, were corporations of different states. It is, too, a well considered case, upon argument of some of the ablest lawyers of the country.

This latter case I regard as on all fours with the present. Upon exactly the same reasoning on which that lease was held "simply void," the contemplated lease to the Pennsylvania Railroad Company, had it been executed—simply regarded as a lease—would also be held void; and now, to avoid the irreparable wrong of its execution, should be restrained. But when we consider that the lease contemplated is not only for thirty, but for thirty-three times thirty years; and not only for a partial use, in common with the other company, but a lease of all the franchises and works, and some *twenty millions of dollars* worth of detached personal and real estate, outside of the works; it would seem to me—I say it with great respect to the court—upon any principle of law or common sense, utterly impossible to hold that the proposed lease, or assignment of the corporate property and franchises of the United Companies, is within the contemplated objects and purposes of their charters. I therefore respectfully submit, that the act of 1870 cannot be sustained upon such a basis.

IV. If the question of validity of the act of 1870 (as defendants' counsel, by their arguments, seem almost to admit) is to depend upon the power of two-thirds in interest of the stockholders to control the remaining one-third, I feel quite sure that, both on principle and authority, the act must fall. The act itself, by implication, admits this in its provision for taking the stock of the dissatisfied stockholders by condemnation. It aims, by this provision, to compel them, either to consent to the lease or else surrender their stock to the companies at an appraised value, on the same principle that lands are taken for highways, upon making just compensation to the owners.

Two things are absolutely necessary to justify this pro-

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ceeding. First, the use contemplated must be a *public use*; and secondly, just compensation must be made *before* the stock can be taken. These are constitutional essentials, required to exist, in order to justify the taking of private property, under legislative authority, by a private corporation. Neither of these, in my opinion, exist in the present case.

The use must be a *public* use, as distinguished from private. Private property, even *with* compensation, cannot be taken from A and given to B, merely because the legislature thinks B is a wiser, more prudent, industrious, energetic, or public spirited man, and will, therefore, make a better use of it; will cultivate the land better, or will introduce a more profitable culture; will grow corn instead of tobacco. Naboth's vineyard could not be taken "for a garden of herbs." It must be a *public use*—*i. e.* useful to the public—as distinguished from mere matter of ornament, taste, or convenience. The San Souci miller's mill could not be taken for pleasure grounds, even for Frederick the Great. And it must be a public use for the people of the state taking it, and not for the people of another state. Private property in New Jersey cannot be taken for the use of the people of Pennsylvania, any more than for the people of England. Every government is for the protection and care of its own people only. The lands taken for the construction of the canal and railroads of the United Companies, were taken, and only could have been taken, for highways for the use of the people of New Jersey; to facilitate *their* travel and transportation to the New York and Philadelphia markets; and not to promote the wealth and prosperity of those cities, however much these works may do so.

Again: the compensation must be made *before* the property can be taken; and in order to be so made, some mode of determining upon its amount, prior to the taking, must be provided for. It cannot be made until the amount is fixed. It must be a *cash* transaction, as distinguished from a *credit*; and a determination of the amount of cash to be

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paid down, must precede the payment. The plain and unequivocal language of our Constitution is, "private corporations shall not be authorized to take private property for public use without just compensation *first* made to the owners."

The "private property," proposed to be taken, under the act of 1870, is the *stock* of the dissatisfied stockholders.

Stock, in a private corporation, may be defined to be the estate or interest which each stockholder has in the corporate property; and is, relatively, to the extent of the ratio, which the number of shares held by him bears to the whole number into which the capital stock is divided. The certificate which he may hold is not the stock; only the evidence of his ownership of it, and of the amount. If the whole number of shares be one hundred, and the dissatisfied stockholder holds ten of them, he owns, in equity, the one-tenth part of the corporate property. His certificate, like a man's deed for his land, is only a muniment of title.

Although the *legal* title is in the corporation, yet the beneficial, or equitable estate, is in the stockholders, whose money paid for the property. The corporation itself, as a legal entity, is the mere representative, or trustee, of the stockholders; and the directors are but managers and agents.

Chief Justice Comstock thus defines stock:

"Whenever it means anything different from the capital of a corporation, it can refer to nothing else than the interests of the shareholders or individuals. Such interests are called 'stocks'; and the sum total of them is, appropriately enough, called the 'stock' of a corporation. Those interests are the resulting estates of private persons, which flow from the nature of corporate organizations. In some respects, they resemble a chose in action; and thus are so treated in the relation of husband and wife, and in other relations. More accurately, I think, they may be called equitable estates; which entitle the holders to share in the income of the capital, which is legally vested in, and managed by the

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corporate body." *People v. Com's of Taxes*, 23 N. Y. Rep. 220.

But, however "stock" may be defined—that it is the "private property" of the stockholders; and that the shares held by each stockholder are his own "private property," and estate, which he can sell, assign, or otherwise transfer, and which can be attached, and sold on execution, will admit of no doubt; and that, as such "private property," it can no more be taken from its owner, except in the legitimate exercise of the right of *eminent domain*, is equally clear.

The charters of the United Companies expressly declare that their capital stocks shall be divided into shares, and shall be "*personal estate*." And our statute of 1846, respecting executions, makes shares of stock in private corporations liable to be seized and sold on execution.

It is this "private property"—this estate in all the corporate property of the United Companies—that the act of 1870 authorizes, or attempts to authorize, the trustees of the dissatisfied stockholders, holding for their use, *first*, to take from them, by assigning it to the Pennsylvania Railroad Company, for its use; and then, *secondly*, after having been thus taken, to be assessed and paid for by the United Companies; which, by the assignment, have been denuded of all their property and franchises, and rendered wholly unable to pay.

1. It is perfectly obvious that the act authorizes, or attempts to authorize, the United Companies, without the consent of the dissatisfied stockholders, first, by contract or lease, to consolidate or demise their works to the Pennsylvania Railroad Company, if that company is embraced in the enacting clause; and under this authority, these companies propose to execute the lease in question, transferring all their franchises and corporate property to that company for nine hundred and ninety-nine years. My first proposition, on the point now being considered is, that such transfer, or taking of the property of the dissatisfied stockholders, through the

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operation of the contract authorized, is a taking of their property for a private use, and not a public one.

When I speak of the private property, or estate, of stockholders of the United Companies, I mean that private estate which each individual stockholder has, in common with others, in the undivided property of those corporations, as distinguished from the public interest, which the state has in their works, as common highways, for the use of the people; and when I speak of taking their property, I mean a taking of their private estate, in that property; and which can only be taken by a legitimate exercise of the right of eminent domain. Such "private property" can only be taken for a *public* use. *Dwarris on Stat. (Potter's ed.) pp. 375, 376.*

It must be kept in mind that the private property sought to be taken in the present case, through the operation of a contract, is the private estate of the dissatisfied stockholders in the corporate property of the United Companies; that the property, so far as the public works—the canal and railroads—are concerned, is already dedicated to, and in the actual use of the public as highways; and that so far as the detached property is concerned, it is the private equitable estate of those stockholders, in such undivided property; that those companies are now the trustees of those stockholders, and hold that private estate for their use. The execution of the lease in question will transfer the legal estate, now held by those trustees, for the use of those stockholders, *to the Pennsylvania Railroad Company, to hold to the use of its stockholders.* The public have no interest in this. It is a simple, unmixed taking of the stock or estate of the dissatisfied stockholders from them and their trustees, and a vesting it in the Pennsylvania Railroad Company, for the use of its stockholders. A taking of the property of A, and giving it to B.

But after this transfer shall have been made, and the property taken, the act provides that an assessment shall be made of its value, immediately before the transfer; and that

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thereupon "the said companies shall pay to such dissatisfied stockholders the full value of their stock" thus assessed. For what purpose? This is not stated; nor how they are to get the money to pay for it. It may be said that it is the *intent* of the act, that the Pennsylvania Railroad Company, having had the whole corporate property vested in it by the transfer, it must pay; and that such payment will enure to its benefit; and that it would then be entitled, in equity, to have the stock of the dissatisfied stockholders, as such, assigned to it. Suppose this to be so; but in what way are those dissatisfied stockholders *to compel that company to pay them*? But suppose it should pay, or furnish the money, and in that way get an assignment of the stock, in specie, made to it—for whose use? Certainly their own: and thus the operation has been that the stock has been taken, in kind, from the dissatisfied stockholders, and given to the Pennsylvania Company. A simple taking, by circumlocution, of A's stock and giving it to B.

But, in all this, the public use of the works—the highways of the United Companies—will have continued unchanged. The private property, only, of the dissatisfied stockholders—their stocks—will have been taken irrevocably from them, and given to the Pennsylvania Company. It is true it has not been done directly, but very indirectly, by stealth as it were; or, at least, subtlety; through a secret contract. Had it been proposed to be done, openly, and by candid legislation, in every word, requiring the dissatisfied stockholders to assign their stock to the Pennsylvania Company, the flagrant enormity would be easily seen, and universally condemned.

In the case of *Coster v. The Tide Water Co.*, 3 C. E. Green 54, to which reference has been made, your Honor held, in an opinion commanding admiration, that an act creating and authorizing a company to improve the salt meadows in the county of Hudson, without the consent of their owners, at an annual compensation per acre, to be fixed by commissioners, and paid by the owners, was unconstitu-

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tional and void. On the principles laid down in this case, I confidently rely to sustain the point which I am now considering, that the use for which the act seeks to take the estate or stock of the dissatisfied stockholders from them, under the power of *eminent domain*, is not a public, but a private use; and that the ultimate right of determining what constitutes a public use, as distinguished from a private one, belongs to the judiciary.

Although the Court of Errors, on appeal, differed with your Honor, yet, I think, not as to the principles stated; but on the ground that the reclamation and improvement of the low and partially submerged meadow lands along our navigable streams—amphibious in their character, like Holland in the time of Cæsar; difficult to decide whether land or water—was, and always has been, both by the legislature and courts, regarded in New Jersey as a public use. The difference was one of *fact*, rather than *principle*. It is so regarded, I think, by the profession; and, on this basis, can be sustained. Having arrived, as a fact, at the conclusion that the reclamation and improvement of the low meadow lands was a *public use*, the Court of Errors properly held that it belonged, exclusively, to the legislature, and not to the courts, to determine upon the *sufficiency* of the use, to justify the exercise of the right. *Tide Water Co. v. Coster*, 3 C. E. Green 518.

2. But I have still another objection to the proviso in the act of 1870, providing for taking the stock of the dissatisfied stockholders by making compensation—that it not only does not require compensation to be made *before*, but that it actually postpones the compensation until *after* the taking; directly in conflict with the provision in the Constitution of this state, “that private corporations shall not be authorized to take private property for public use, without just compensation *first* made to the owners.” *N. J. Const., Art. IV, § 7, cl. 9.*

This objection is expressly made in the bill; and is the *sixth* reason assigned, in detail, against the proposed lease.

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No answer is attempted to be made, or explanation given to the objection, in the answer. Nor, as far as I have observed, has any answer been attempted, in the arguments of the opposing counsel, who have preceded me.

There are two provisions in our Constitution, touching the taking of private property for public use. The *first* is in the bill of rights, (*cl.* 16,) that "private property shall not be taken for public use without just compensation." This is general, applicable to all such taking, whatever the emergency; whether to meet the immediate necessities of active warfare, or to prevent the spread of a conflagration; or where the necessity is not pressing, as in the ordinary cases of private corporations, under their charters, taking lands for highways. The *second* is in the article relating to, and limiting the legislative power—that "individuals or private corporations shall not be authorized to take private property for public use, without just compensation *first* made." (*Art. IV, § 7, cl. 9.*) It was not then so well settled as it is now, that in all cases admitting of it, the right to compensation, either before or at the time of the taking, was an inherent qualification of the power of *eminent domain*. I was a member of the Convention, and my recollection is, that this second provision was made on my motion. It meets exactly the present case.

As already stated, the proviso in question not only does not require compensation to be "*first*" made, but expressly postpones the payment, by simply providing that, after the contract or lease shall have been executed, commissioners, on twenty days' notice, may be appointed to assess the value of the stock, to be paid on the subsequent award of the commissioners.

There is, obviously, no power given, by this proviso, to make application for an assessment, until after the lease or other contract has been executed; that application must be made on twenty days' notice; on that application, commissioners are to be appointed, who, at some *subsequent* time—not specified—are to assess the value; after which, the value

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having been thus ascertained, the United Companies are to pay the owners of the stock the amount assessed. All this has been done, and must necessarily be done, *after* the making of the lease. It is so, expressly, required by the act. Consequently, no obligation to pay can arise; for no possibility of payment can exist, until the amount to be paid has been ascertained; which cannot be, until more than twenty days after the execution of the lease; and if that act constitutes the taking, not until that period of time after the property has been taken.

What then constitutes the taking? Whenever, under the provisions of this act, the title of the dissatisfied stockholder to his stock, or his estate in the corporate property, is to pass from him, or his trustees, to some other person, or company, then his property will be taken, within the meaning of the Constitution. *Whenever it ceases to be his, and is transferred to another, it is taken from him.*

Whenever then, under this act, according to its provisions, the lease in question may be made, that is the time fixed by the act for the taking of his property. It would then cease to be his, by becoming the property of the Pennsylvania Railroad Company for nine hundred and ninety-nine years. That act would necessarily constitute the taking. His *equitable* estate which, up to that time, had been his, by the *legal* title remaining in the United Companies for his use, will now have passed from him, with the legal title of his trustees, to the Pennsylvania Railroad Company. His control, and the control of his trustees, ceases. His estate, with the legal estate, has passed to that company, for its use; and he must now look to the United Companies only for payment. And the marked peculiarity of the transaction is, that the very act, which strips him and his trustees of their respective estates, and requires them to pay, deprives them, absolutely, of all means of payment.

The act, then, which requires commissioners of assessment to be appointed more than twenty days after the property of the dissatisfied stockholders has been taken, cannot

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be said to provide for "just compensation, *first* to be made," and is, therefore, necessarily, unconstitutional.

I respectfully submit, for the reasons stated, upon both the grounds last urged, that the use contemplated is not a public one, and that payment for the stock to be taken is not required to be made before being taken; the act, as to the complainants, is unconstitutional and void.

V. My next and last subordinate proposition, under the principal one, that if the act of 1870 can be construed to authorize the United Companies to make the lease in question, is this: If it can be held that it is competent for the legislature to authorize the execution of the lease in question against the will of the stockholders, or that the use contemplated is a public use; or can be held that the stock of the dissenting stockholders can be condemned as for such use, and taken by the United Companies in the mode provided for in the statute of 1870; I yet maintain further—

That that act is void, because it delegates, or attempts to delegate, to those companies, by contract between them and other canal or railroad companies in or out of this state, the power to determine what constitutes a sufficient public use to justify an exercise of the right of eminent domain, and then to carry such contract into execution by condemnation of the stock of dissatisfied stockholders; whereas, such public use can only be determined by the legislature, and carried into execution immediately by the state, or some constituted agent of the state, or else, indirectly, through the instrumentality of the courts, or other established tribunals of the state.

I direct your Honor's attention, before proceeding to discuss this proposition, to the substance of the enactment, relative to this point.

It is, that it shall be lawful for the United Companies, with the consent of two-thirds in interest of the stockholders of each, by agreement, contract, lease, or otherwise, to make any arrangement, for connection or consolidation of business, with any canal or railroad company or companies, with

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which they are identified in business, or whose works form with theirs, continuous or connected lines; and if any stockholder shall be dissatisfied with such contract, the United Companies may take his stock at its value, to be appraised by commissioners.

It is lawful, then, for the United Companies to make any agreement with any other canal or railroad company, with which they are identified in interest, and then such contract is to be valid; and they are to carry it into execution, by exercising the right of eminent domain. The only limitation upon this power of contracting, being in terms as it is in fact, if valid, a roving commission to the United Companies, to go out into the world and make contracts with any railroad or canal company they please, is, first, that it shall be a *business arrangement*. What other kind of arrangement could they make? Secondly, it must be with a canal or railroad corporation, in some way identified or connected with them in business. They could, in one minute, make a contract identifying them; and then the next minute, make another contract or lease by which to condemn the property of the stockholders. Selecting such a corporation, so far as I can see, the only limit is, that it shall be a *business contract*; and I never yet knew any other. It may be for the construction of a railroad in Kansas or Kamschatka; or else for the constructing and running a line of steamers from San Francisco to Yeddo!

Still, there is yet a constitutional limit, which hedges in and protects private property. If such contracts are to be carried into execution by taking private property, there must be some sufficient public use to justify the exercise of the right of eminent domain. Two things are necessary to justify the exercise of that right. First, it must be for a public use; and second, that use must be of sufficient magnitude to induce the legislature to act upon it.

Coming, then, to this case—to justify taking the stock of the dissatisfied stockholders by condemnation, it must be for some such sufficient public use as to induce the legislature to

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authorize it; and my objection to this statute is, that it authorizes, or attempts to authorize, the United Companies to determine, not only what is a public use, but upon the sufficiency of it; instead of the legislature of the state, by special or general laws, so deciding. In other words, instead of the legislature, openly and publicly, at the place and in the manner authorized by the Constitution to legislate; in open public council, deliberating, discussing, and determining what constitutes a public use sufficient to authorize the forcible taking of private property; this act leaves, or attempts to leave it, to the United Companies.

Now, it is very clear that, if the act of 1870 is valid, the legislature has made the United Companies, so far as this power of contracting extends, the exclusive judges of what constitutes a public use, sufficient to justify an exercise of the power of eminent' domain. It is, therefore, to say the least of it, an attempt to delegate to private corporations, secretly, privately, and for their own use, the power to determine, within the limits of the ceded powers to contract, what constitutes a sufficient public use to justify the taking of the private property of the people of New Jersey from them, and giving it to others, for an assessed compensation.

My proposition is—the legislature has no such power. That it holds the sovereign attribute of eminent domain in trust for the people of New Jersey, and cannot delegate it to private corporations; and much less to be exercised for their own use.

1. The right of eminent domain is “that *dominium eminens*, or superior right, which, of necessity, resides in the sovereign power in all governments, to apply private property to public use, in those great public emergencies which can reasonably be met in no other way.” 1 Redf. on Railw., p. 229, § 63, and cases cited.

See Vattel, Bk. 1 ch. 20, sec. 244; Code Napoleon, Bk. 2, tit. 2, 545; 1 Black. Comm. 139; Gardner v. Newburgh, 2 Johns. Ch. 162; Vanhorne's Lessee, v. Dorrance, 2 Dall. 304.

Of the cases cited by Redfield, I refer to the following

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upon the point now being considered, *viz.* that the legislature *only*, can judge of the sufficiency of the public use, to justify the exercise of the right of *eminent domain*.

Bonaparte v. C. & A. R. Co., *Bald.* 220; *Beekman v. Sar. & Sch. R. Co.*, 3 *Paige* 73; *Heyward v. The Mayor*, 3 *Seld.* 325; 2 *Blatchf. (U. S. C.)* 99; *Tide Water v. Coster*, 3 *C. E. Green* 522.

These authorities—going back to remote antiquity, and coming down to the present day—establish, incontestably, that the right of *eminent domain* is one of the highest attributes of sovereignty, to be exercised only for *public use*, in case of necessity; and that nothing but the legislature can rightly determine upon the necessity, and of the character and extent of the public good, which will justify its exercise. In other words, that private property—its protection being one of the two objects of all government—can be, in no sense, violated, except by the sovereign power, in cases of necessity, for the public good.

But these authorities, I admit, leave it still to be decided in what way the legislature—having determined the extent and character of the public use which, in each case, will justify the exercise of the right of *eminent domain*—must carry the object into execution. The legislature must, in some way, determine the character of the public use, which will justify the exercise of the right. But, in saying this, I do not question, but admit, that, after the *public use* shall have been determined by the legislature to be sufficient to justify the exercise of the right, the object may be carried into execution, either, indirectly, through the instrumentality of special agencies, or the public courts or officers; or, directly, by the state itself. This is *conceded by my proposition*.

It is done, directly, by the state, when it, by its own political officers, and out of its own treasury, constructs and operate works of *internal improvement*; as Pennsylvania, at first, constructed her railroads and canals, and operated them, through the instrumentality of her own public officers.

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And, as was done in the Province of New Jersey anterior to the American Revolution, in the laying out and maintaining of the King's highways.

All states must act by public officers or agents. The *ideal* state has neither head nor hands, unless it be a single despot ; and then he acts not as a man, but as the state. The ideal state is embodied in himself. All states, I repeat, must act by officers or agents ; but they must be the officers and agents of the *state*, and not of *private corporations*.

It may also be done by indirection. By creating private corporations especially for the purpose, and conferring upon them the franchises and powers of making the highways, as was done in the case of the United Companies.

What does the state then do ? It determines that it is a public good to make a railroad from the city of Camden to Jersey City ; or a canal from the Delaware to the Raritan ; and that that is such a public good as will justify the exercise of the right of eminent domain. That determination is made directly by the state, through its legislature. Having thus decided, it carries its judgment into execution by creating a private corporation as its agent ; which, for a consideration given—tolls and freights and fares—is authorized to execute the work, by fixing upon the precise line and mode of construction. Not judging for themselves, as judges in their own cause, but, through the instrumentality of courts and tribunals, condemning the property to public use, and taking it under the special act of the legislature.

Or, it may be done by conferring the power upon a single individual, not a corporation ; as was done for the purpose of shortening the navigation of Salem creek. The legislature authorized John Denn, (a gentleman well known to the profession,) to cut a canal across the bend of a peninsula formed by that creek—a short half mile—instead of rounding the bend for two or three miles. The legislature determined that the shortening of the navigation was a public good, and then authorized John Denn to execute the work.

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He did it, and his authority was sustained by the courts of this state, in the case of *Sinnickson v. Johnson*, 2 *Harr.* 129.

Or, the judgment of the legislature may be carried into execution—as is now done through all the United States, and in this state, and in England; and, perhaps, almost everywhere—through the instrumentality of courts and public officers, in the laying out of ordinary public highways under road laws. I presume, if the legislature should see fit to pass general turnpike and railroad laws, instead of granting special acts, it might, for purposes of making turnpikes and railroads, admitted highways, do it through the same instrumentality.

On this point I refer your Honor to the case of the *Delaware and Raritan Canal Company v. The Camden and Atlantic Railroad Co.*, 1 *C. E. Green* 365.

But, when done through the instrumentality of courts and public officers, they are the courts and officers of the state; constitutionally organized and appointed; independent men, public officers, sworn to perform their duty. Not by private corporations, for their own use, in the mode described.

The United Companies, however respectable, are not the public tribunals of the state; have not sworn allegiance; have not been appointed by the people, nor by any of the organized tribunals. More than all this, under the act, the United Companies judge for themselves. That cannot be. No man can be made a judge in his own cause. While there is no provision in the state Constitution against it, there is such a provision in the constitution of nature. No legislature can make such an appointment; nor provide for it. Nor, I respectfully submit, can the legislature appoint private corporations to determine, for their own use, when my property shall be taken from me and transferred to them, or some other, for their use.

The right of eminent domain is a sacred trust, and, like all other trusts, cannot be delegated. It has been confided by the people to their representative government in trust for them, and only that government can execute it. It cannot

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delegate it. Much more, can it not delegate it to men, or private corporations, to determine for themselves, and for their own use, when it shall be exercised.

See *Smith's Const. Law*, p. 487, § 331, and p. 517; 11 *New Hamp.* 19; 23 *Pick.* 396; 21 *N. Y. Rep.* 598.

No stronger or more strikingly objectionable exercise of the powers attempted to be given by this act to the United Companies, can be suggested than the lease in question. Under pretence of a lease of their "works" to the Pennsylvania Railroad Company, they barter away all their franchises, and assign all their other property. On what ground? They are authorized to "*lease*." What? To lease cash? To lease franchises? No, they are simply authorized to lease their works. But what do they do? They lease \$4,555,905 of stocks; \$356,750 of bonds and mortgages; \$2,135,436 of cash advances; \$57,752 of sinking fund; \$447,880 of unappropriated materials; and \$831,285 of clear cash, in the hands of the treasurer! Thus they propose to lease for nine hundred and ninety-nine years, \$8,385,009 of cash, and cash assets; and this, under authority to lease their "works!" What are these cash assets? They are the net profits; in part the earnings of the United Companies which, under special acts of the legislature, they have invested, instead of dividing them into dividends to the stockholders.

They are the *net earnings* of the companies over the cost of their works, invested for the use of the stockholders; and I hold it to be perfectly indisputable, that no corporation, unless specially authorized by language that will admit of no two constructions, can "lease" that amount of the personal property of its stockholders.

But not content, they do all this, and much more. They have real estate, in no wise connected with the working of the roads, amounting to as much more as the sum which I just now stated, and they dispose of all that real estate, on a lease for nine hundred and ninety-nine years. Is not this a beautiful scheme on the face of it? The covenant in the lease is, that the Pennsylvania Railroad Company may dis-

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of any part of this property whenever the lessee—*i. e.* Pennsylvania Railroad Company—shall think proper!

The lessee, the Pennsylvania Railroad Company, when it shall think it necessary for the use of the canals and roads, or for the protection of the interests of the lessors sell their property, may do so. Why not leave the lessors the discretion about that? Oh, but they are to have the consent of the lessors. Who are the lessors? The board of directors of the United Companies, the joint board, a single board, or all the stockholders?

The concluding clause of this covenant is: "The proceeds of all such sales shall be applied, at the option of the lessee, either to the permanent reduction of the funded debts of the lessors, or either of them; or to permanent additional improvements, upon the property hereby demised."

That is an extremely equitable provision! The Pennsylvania Railroad Company have got the property for nine hundred and ninety-nine years. They may sell ten or twelve millions of dollars of real estate and cash assets, and lay out the proceeds in permanent improvements at Harsimus Cove, for their own use, for nine hundred and ninety-nine years. Or that, the lessors can enjoy those permanent improvements! If you give me property for nine hundred and ninety-nine years, I will be exceedingly liberal with the reversion. I do not pronounce the lease a cheat; but it strikes me that among plain people, not accustomed to examine closely such instruments, it is very well calculated to mislead.

III.

If the act of 1870 can be construed to sanction the lease in question, then my proposition (which I regard rather as principal than a subordinate one) is—

That the canal and railroads of the United Companies, created in the statute their "works," are public highways of, and within this state; and that it is not competent for the

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legislature, directly or indirectly, to assign or transfer, or to authorize the assignment or transfer of the highways of the state to a foreign corporation; and that the proposed lease would, therefore, be void.

In maintaining this proposition, I beg leave, first, to translate several of the words contained in it.

By *assignment*, I mean a transfer for a valuable consideration, vesting in the assignee, by an irrevocable contract, an absolute right of property in, or control over, the highways.

By *direct* assignment, I mean one made directly by the state to the corporation; and by indirect assignment, I mean one made through the intervention of a corporation, in which the state has vested a legal title to such highways, as its agent or representative.

And by a *highway of the state*, I mean some public line of travel or transportation, established by the state, in the exercise of the right of *eminent domain*, which every citizen has a right to use.

And by a *foreign corporation*, I mean a corporation created and controlled, wholly, by a state other than that in which the highway is.

That the Pennsylvania Railroad Company is such a corporation will admit of no question.

The "*works*" of the United Companies are declared "common highways," by their respective charters; and, therefore, every citizen has the right to use them; the lands on which they are constructed and operated, were taken by condemnation, in the exercise of the right of *eminent domain* by the state, through the instrumentality of those corporations; and they are maintained by established tolls, freights, and fares, paid by those who use them.

The transfer proposed is nominally a lease for nine hundred and ninety-nine years—*i. e.* forever, a perpetuity—upon a contract which, if valid, is necessarily irrevocable, to pay as a rent \$2,000,000 annually, and discharge certain obligations of the lessors.

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The simple question therefore, in this aspect of the case, is: Can the legislature of New Jersey authorize such a lease to the Pennsylvania Railroad Company? I maintain it cannot.

I. The making and maintaining of highways is one of the three necessities of government—*trinoda necessitas*; essential to civilization; and therefore a duty which every state owes to its own citizens or subjects.

The three necessities of government, as I understand them, are *highways, taxes, and courts*; or, a judiciary for the punishment of criminals and the administration of justice. The powers necessary to provide these necessities are sovereign powers. They are confided, *in trust*, by the people to their sovereign, of which trust he is incapable of divesting himself. The making and maintaining of highways require a constant exercise of the highest and most delicate attributes of sovereignty—the right of taking private property for public use for their construction, and the right of taxation for their maintenance and repair. 4 *Bac. Ab., tit. Highways A, note a.*

See also, *Angell on Highways* 53, § 76; *Del. & Rar. Canal Co. v. Rar. & Del. Bay R. Co.*, 1 *C. E. Green* 364.

The money of the people makes and maintains the highways. The state is their trustee—holds for their use. The people are taxed, both to pay for the property for making the highways, and for their making and repairs. Corporations, making these expenditures under legislative sanction, are authorized to charge tolls, freights and fares at rates which produce sufficient to meet their expenditures, and pay them for their care and labor. In this way, by a kind of special tax, the people who use them are taxed in proportion to their use. Whether made and maintained, therefore, directly by the state, or through the agencies of corporations, the people are taxed for their making and repairs.

2. If the making and maintaining of highways call into continued action the highest attributes of sovereignty, then

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those attributes—being portions of the sovereignty, and *incidents* of the highways—cannot exist the one without the other : consequently, to part with one is to part also with the other.

In other words, a state cannot dispose of those highways without, at the same time, disposing of those attributes of sovereignty which are incident to and form a part of the highways. A state could as well farm out the courts to another state, to run the judicial “machine.” The making and controlling of highways is as much an act of sovereignty as the making and controlling of courts ; and the state can as well surrender or assign the one as the other. The highway and the power are as inseparable as the shadow and the substance ; they come and go together.

3. The *supreme power* of a state—usually denominated *sovereignty*—committed by the people to their government, whatever its form, is a *sacred trust* confided by them to it, for their own protection and welfare, and not for the protection and welfare of any other people. It is, therefore, *inalienable*. *Puff. Law of Nature and Nations*, Book 8, ch. 5, § 9 ; *Locke on Gov't*, 304 to 307 ; *Vattel*, p. 31 ; *Del. & Rar. Canal Co. v. Cam. & Atl. R. Co.*, 1 C. E. Green 364, 365.

The state cannot delegate the trust, for that would be divesting itself of the power to perform its own duty. To delegate by an irrevocable contract, vesting, directly or indirectly, its control in another, is to surrender all power over it. A sale of the trust, confided personally to the state, would not only be a breach of trust, but a void act.

Railroads are highways. This is admitted. No corporation has any property in them as highways, although it may have property in the *franchises* ceded to it, and exercisable by it, to the extent of the grant.

See opinion of Chief Justice Black in *Erie & Northeast R. Co. v. Casey*, 2 Casey R. 307.

4. If the power be surrendered to another state, its exercise would be by and for the people of that state. The people of New Jersey did not form their government for the

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people of Pennsylvania, but for themselves. They made their constitution; they made the state, for their own good. If the trust of making and maintaining highways for their good should be surrendered, it might not be performed at all; or, if performed, solely for the good of others.

I maintain that the highways of a nation are upon, and are a part of the soil of a nation—inseparable from it, and can no more be bartered away by the legislature than any other or all other portions of the territory.

Let me put a case by way of illustration: Suppose the state of New Jersey, instead of having constructed a railroad through the instrumentality of a corporation across the state, had directly, from its own treasury, condemned and taken a strip of land, one hundred feet in width, from Trenton bridge to Jersey City; had made thereon an ordinary highway, hard and smooth as the roadways of the best possible construction, equal or superior to the Roman ways; and that Pennsylvania should then construct another of like character from Pittsburg to Trenton bridge, as smooth and level as this floor, so that any kind of carriage could run upon it, the question then which I propose is this—

Could the legislature of New Jersey sell her highway to the state of Pennsylvania, and put her in the absolute possession and control of it? If so, then Pennsylvania would come into New Jersey. How could she push her sovereignty inside of ours? Two substances cannot occupy the same place at the same time. If our highway could be sold to the state of Pennsylvania, so that the state of Pennsylvania might come here with her executive, her officers, her courts, and take the absolute possession and control of our highway, then the state of Pennsylvania would occupy our soil, and push New Jersey “from her own stool.” But every state is full of its own sovereignty.

If the state of Pennsylvania take control, she may bar up those tributaries by actual bars, if you please; or, she may exact toll of the citizens who travel upon them; or do any other thing she may choose to do. How would that comport

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with the honor, the dignity, the sovereignty of the state of New Jersey? Instead of exercising the power incident to her sovereignty, of making and controlling her highways, she has surrendered it to another state, which deprives her own citizens of its use.

5. If she cannot assign such a highway as that, she cannot a railroad. They are, in substance, the same. Each is the avenue along which the people of New Jersey go to market. It was made for them; with their money; on their soil; and for their use: and cannot be disposed of for the benefit of the people who come from California, or from any other state. The gentlemen on the other side tell us the lease is a magnificent scheme for the good of the whole people; conferring benefit on all out-doors. It is the duty of the state of New Jersey, according to their theory, to make highways for the commerce of the world; and they have cited the Constitution of the United States for that! My understanding of the Constitution of the United States is, that if the people of other states choose to come over into New Jersey, they shall have the same right to use our highways that we have. But, *I rather think*, they have no right to compel us to make highways for them; nor are we compelled to let them come here and make them for themselves, and control them.

I submit that the highways of this state belong to the people of this state; that they are the beneficiaries, and that the state cannot dispose of them.

6. If it cannot be done directly by the state, it cannot be done indirectly through the instrumentality of corporate agents, or a foreign corporation. What cannot be done directly by principals, they cannot authorize agents to perform. We cannot communicate strength to others which we do not possess ourselves; to do what we cannot do. The stream can be raised no higher than its fountain.

If the United Companies, creations of New Jersey and subject to her jurisdiction and laws, can be empowered to transfer her highways to the Pennsylvania Railroad Com-

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pany, the creation of that state, and subject only to her jurisdiction and laws; then Pennsylvania, governing her own corporation, will control through it those highways, as effectually as if they had been transferred immediately to her by the state of New Jersey. The servant would be subject to his master, and the master would act through his servant. *Qui facit per alium, facit per se.*

II. My argument, thus far on this point, assumes that a foreign corporation is capable of becoming the lessee of the works of the United Companies, but that our legislature is incapable of authorizing such a lease. In other words, that the incompetency is in the legislature, simply. In order to make a good lease, there must be a capable lessor and a capable lessee. I now reverse the condition of imbecility, and maintain that the Pennsylvania Railroad Company, being a foreign corporation, is incapable of becoming the lessee of those works, because it is incapable of entering into their possession and enjoyment so long as it is a foreign corporation. Observe the qualification: I say, so long as it is a foreign corporation, it is incapable of taking possession; for I do not question that the legislature of New Jersey may incorporate J. Edgar Thomson, Thomas A. Scott, and all the stockholders of that company, and make them a corporation. Then they would be a New Jersey corporation—a creature of this state—on which it could confer whatever powers it pleased. Or, it might, perhaps, by some indirection, make the Pennsylvania Railroad Company a *quasi* corporation, for the purpose of operating the United Companies' works. But that has not been done, nor attempted.

1. The Pennsylvania Railroad Company is now purely a foreign corporation. It is so charged in the bill, and admitted in the answer. Nothing has been done, or attempted to be done, by our legislature to make it a domestic, or a *quasi* domestic, corporation. There is nothing in the answer pretending any such thing. The simple authority to *contract*, does not domesticate it. If it would, then a grant to the United Companies to contract with the corporation of London, or with the

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East India Company, would make them *quasi* corporations of New Jersey. It requires something more than a mere power of contract. There must be something to domesticate them; to make them, as it were, citizens of New Jersey; and bring them within the control of our own laws. Until this shall have been done, they will be incapable of coming here and taking possession of our highways.

As yet, New Jersey has, at most, attempted to confer the power of entering into certain business contracts with foreign corporations,—not to create them New Jersey corporations, nor to domesticate them. No such attempts, or thought, can be found in the act. Nothing of the kind is suggested, either in the bill or answer; nor, as yet, in the arguments of defendants' counsel. The proposed lessee, therefore, stands now here, a purely Pennsylvania corporation; and, as such, I maintain that it is barred out of New Jersey, and incompetent to come into it for the purposes contemplated by the lease.

2. It is obvious that the works of the United Companies of New Jersey—their canal and railroads—are on, and a part of the soil and territory of New Jersey; and are now under and subject to the jurisdiction of New Jersey, and must continue so until in some way ceded to the state of Pennsylvania, and thereby brought within her jurisdiction. I have already attempted to prove that that cannot be done. Trusting to my success on that point, I now assume that they are, and must continue to be, a part of our territory, and within the jurisdiction of our state. The question then is: Can a purely foreign private corporation enter upon and take possession of and operate those works, in this state, as contemplated by the proposed lease?

3. In order to effect the object of the lease, it would be necessary for the lessee to enter upon and take possession of the demised premises. No action for rent accrues, or can be maintained, until there has been actual entry, or ability on the part of the lessee to enter. The covenants are void if the lessee cannot take possession. The perfection of the

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lease, therefore, requires entry, or a power to enter. If the lessee has no power to enter, the lease cannot be made. It takes two to make a bargain. The law on this point is perfectly familiar to the court. See *Salmon v. Smith*, 1 *Saund. Rep.*, p. 203, note 1.

My proposition, as already stated, is that the Pennsylvania Railroad Company is a foreign corporation, created by the state of Pennsylvania, and can have no actual, potential existence in the state of New Jersey, sufficient to enter upon and take possession of the works of the United Companies and operate them; and that, without such power, it cannot become the lessee of the United Companies.

“A private corporation, whose charter has been granted by one state, cannot hold meetings, pass votes, and exercise powers in another state. It can have no legal existence out of the boundaries of the sovereignty by which it is created. It must dwell in the place of its creation, and cannot migrate to another sovereignty.” *A. & A. on Corp.*, § 104, and cases cited.

This is very strong language; cannot be made stronger. “It can have no *legal* existence out of the boundaries of the sovereignty by which it is created.” As it is, itself, a mere legal entity, if it can have no “legal” existence, it can have none whatever, for it lives and breathes only by law. If it “cannot hold meetings, pass votes, or exercise any powers” in another state, on what principle can it enter into the actual possession of the franchises and works of the United Companies, impossible to be separated or moved from New Jersey? The sovereignty of New Jersey cannot go out of, nor the sovereignty of Pennsylvania come into, New Jersey. If the Pennsylvania Railroad Company cannot dwell in any place but Pennsylvania; if it cannot live or breathe, elsewhere; then it would be a *dead* corporation as soon as brought here. It would be nothing.

I refer also to a case decided in our own state: *Hilles v. Parrish*, 1 *McCarter* 380.

In the case of the *Bank of Augusta v. Earle*, Chief Justice

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Taney, after the arguments of some of the ablest counsel of the country, delivered a very learned and exhaustive opinion. He said: "Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members. * * * And it may be safely assumed that a corporation can make no contracts and *do no acts*, either within or without the state which creates it, except such as authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes. And if the law *creating* a corporation does not, by the true construction of the words of its charter, give it right to exercise its powers beyond the limits of the state, all *contracts* made by it in another state would be void." And again he adds: "It is true that a corporation can have *no legal existence* out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." 13 *Peters* 587, '8.

4. While it may be true that a foreign corporation—not of legal right, but by the comity of nations—may make contracts existing only in words, transitory in their character; yet it is not, and cannot be true, that a being incapable of existing in New Jersey, can have or take the actual possession of the highways of New Jersey. Contracts are but breath; but the possession of lands passes by delivery. *Franchises* are not contracts; they are *sovereignties*, as distinguished from contracts.

See the case of the *Ohio & Mississippi Railroad v. Wheeler*, 1 *Black's Rep.* 286, 297.

The right of a foreign corporation, by comity, to exercise the power of contracting, and doing certain other acts which are incidents of *corporations*, is a very different thing from exercising those corporate franchises and powers which are the incidents of *sovereignty*. By comity, the incidental pow-

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ers of corporations of other states, may be exercised out of the state of their creation, but no comity can, or ought to, extend to the authorizing of foreign corporations to exercise attributes of *sovereignty* in any other state than that in which they were created. Before such sovereign powers can be exercised, the corporation must, in some way, become domesticated. That has not been done, nor attempted to be done here.

See the case of *The State v. The Boston, Concord, and Montreal Railroad Co.*, 25 Vt. 436, 442.

The true distinction is clearly, positively, and most conclusively, to my mind, stated in this case—that, while by the comity of nations, the incidental powers of a corporation may be exercised through the instrumentality of agents, as that a New Jersey corporation, or even the state of New Jersey, may, by an agent, go over into the city of Philadelphia and buy something for the corporation or state; yet that the comity of nations does not permit the introduction of an agent of a foreign corporation to exercise the sovereign powers of the state creating it, in another state. That is quite a different thing.

See *Commonwealth v. The Franklin Canal Co.*, 9 Harris 125.

In conclusion, upon this point, I respectfully submit that, both on principle and authority, a purely foreign corporation can have no legal existence in the state of New Jersey; and that the Pennsylvania Railroad Company, being such corporation, can, therefore, have no legal existence in New Jersey; and, consequently, is incapable of being the lessee of the works in question. Hence, that the Pennsylvania Railroad Company cannot become the lessee and take possession of those works; and, being incapable of so becoming a lessee, any lease of those works to it, would necessarily be void.

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IV.

The Pennsylvania Railroad Company has no legislative authority from the state of Pennsylvania, to become the lessee of the United Companies of New Jersey, as contemplated by the lease in question.

1. The charter of the Pennsylvania Railroad Company, itself, contains no authority to that company to become the lessee of any canal or railroad corporation; much less of a foreign canal or railroad corporation.

They rely on the acts of 1870 and 1871. We must, then, look to them for the enlarged powers claimed to be conferred. No power is expressly given to that company to lease the United Companies' works, although it may be that it had a "hankering" after them. But, to exist, it must have been granted by such express and unequivocal language as will admit of no doubt. As to that, I cannot be too emphatic.

2. It is a well established rule of law, in England and this country, that corporate grants must be free from doubt. This is true as to domestic corporations. Much more so, I think, when applied to foreign corporations; and *a multo fortiori* in its application to foreign corporations, in reference to such grants of powers as are now claimed.

Although we had supposed that the Delaware river separated the state of Pennsylvania from New Jersey; and, consequently, separated the lands and works of Pennsylvania from those of New Jersey; yet to sustain implied grants, it is seriously claimed here, that the works of the Pennsylvania Railroad Company, on the west side of the Delaware, are connected with those of the United Companies on the east side, simply because of ability to cross the river, in vessels, from one to the other! For instance, because the Pennsylvania Railroad Company has a depot down the river two or three miles from Philadelphia, from which to ship oil; and because a canal boat can pass from Bordentown

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down to that depot, it is claimed that the Pennsylvania Railroad "connects" with the Delaware and Raritan Canal. Upon the same principle, the ocean which separates Europe from America, connects those continents. And, although the statutes require the "works" of the companies, to justify a contract of consolidation, to be "connected;" yet that any existing business arrangement between them, will constitute a connection within the act. If so, a business arrangement could be made one minute sufficient to stand upon in order to "connect," and the consolidation or lease be effected the next. This is the latitude of construction claimed.

3. There are only four statutes of Pennsylvania, to which I shall refer. They are, *first*, the act of March 29th, 1859; *second*, the act of April 23d, 1861; *third*, the act of February 17th, 1870; and *fourth*, the act of May 3d, 1871. These are all I have investigated.

The first two of these acts are expressly confined to Pennsylvania corporations. The first authorizes companies, owning connecting railroads in the state of Pennsylvania, to enter into any lease or contract with each other, in respect to the use, management, and working of their several railroads. That is in terms confined to the state. The phraseology of the act is, "*connecting railroads*." The true intent of those words, as I understand, became the subject of judicial inquiry in that state, and it was held that they meant an actual, immediate, and physical connection.

The second Pennsylvania act, to which I have referred, authorized the railroad companies of Pennsylvania to enter into leases or contracts with other roads, although connected only *by intervening railroads*, curing the supposed defect in the first act. Hence, so far as the state of Pennsylvania is concerned, a connection by intervening railroads, however long or short, if it be a connection of an actual, visible, tangible character, is authorized. Neither of those acts extended to foreign corporations. I may add, too, that they are both confined to *railroads*, as distinguished from

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canals, or navigation works. Those two acts may, therefore, be excluded from consideration in this case.

The third is the act of February 17th, 1870, which preceded ours of March 17th, 1870, by just one month. By this act it is enacted, "that it shall and may be lawful for any *railroad company or companies in this commonwealth*, to lease or become the lessees, by assignment or otherwise, of any other railroad or railroads, or enter into any other contract with any other *railroad* company or companies, whether the road or roads embraced in such lease, assignment or contracts, may be within the limits of this state, or created or existing, under the laws of any other state or states."

It will be perceived that this act is confined to railroads to be leased directly, or to be acquired by assignment or otherwise. Beyond all question, the words "road or roads," in that connection, refer to railroad or railroads; and not to common turnpikes or plank roads, or anything of that kind; much less to ferries and steamboat lines. Then comes the proviso: "Provided, that such road or roads so embraced in any such lease, assignment, or contract, shall be connected, either directly or by means of intervening lines, with the railroad or railroads of said company or companies of this commonwealth so entering into such lease, assignment, or contract, and thus forming a continuous route or routes for the transportation of persons and property."

The act of 1870 contains the substance of the two acts of 1859 and 1861; but enlarges the power in them, to the leasing or contracting with railroads *outside of the state*. The substantial effect, then, of the act of 1870, was simply to extend the provisions of the acts of 1859 and 1861 to railroads outside of the state of Pennsylvania. But that act does not extend to *canals*.

Then came the act of 1871, which simply enlarged the powers in the act of 1870, to the leasing or the making of contracts, relating to "*canal and other navigation works*," situate in Pennsylvania or any other state. Those two acts,

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it is claimed, will embrace the works of the United Companies—both railroads and canals—and their appendages.

The statutes of Pennsylvania, as they now stand, authorize any railroad company or companies in the state of Pennsylvania, to obtain, by lease, assignment, or otherwise, any other railroad or railroads in that state, or any other state of the Union. With reference to this legislation, one point, I think, is conclusive, so far as the present case is concerned. The power granted to the Pennsylvania companies is confined to *railroads, and canal and navigation works*. It does not extend to banks, nor to insurance companies, nor to steamboat lines, nor to plank roads, nor to bridges, nor to ferries, nor any such small “trash.” Nor does it extend to the acquisition of from *ten to twenty millions* of stocks in other companies; and cash assets of every kind and description. Nor does it extend to the buying up of sinking funds; nor to the guaranteeing of millions of debts; nor any such friendly accommodations as sometimes operate upon the minds of persons having souls.

4. Touching those matters, let me direct your attention to what this so-called lease proposes. I am now speaking simply of the statutory powers of the Pennsylvania Railroad Company to come into New Jersey, and buy up railroads and other “fixins.”

It is the outside property referred to in this lease, about which I wish to inquire. The United Companies own various ferries, and own property, real and personal, “in *said* cities heretofore named;” which are in New York, Philadelphia, Jersey City, New Brunswick, South Amboy, Trenton, and Camden, “and *elsewhere*.” My inquiry is: Where is the right granted to the Pennsylvania Railroad Company, by those statutes, to become the lessee of that property?

The United Companies own \$8,385,009.35 of nearly all kinds of personal property, scattered about; “lying loose” all over the state of New Jersey, and “elsewhere.” By means of these, they control the West Jersey Railroad and all its branches; the Belvidere Delaware Railroad; and all

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the other railroads that are in subjection to them, on the principle that the servant is controlled by his master. How did the United Companies get the power to buy those stocks, and to make the other investments? By special, specific acts of the legislature of New Jersey, authorizing them to do so. Now, I ask, and I desire a direct answer: Where in those Pennsylvania statutes, does the Pennsylvania Railroad Company acquire the powers to come here and buy, or "lease" those stocks and other assets, from the United Companies?

Did it ever enter into the imagination of anybody, in the state of Pennsylvania, or "elsewhere," except only the procurers of those statutes, that they could be held to extend to the buying up of stocks, cash, cash assets, and lands, lying around loose in the state of New Jersey? There is only the trifling sum of about eight millions and a half—nearly one-half their entire capitals—personalities, alone. Without any kind of enactment whatever, other than an authority to buy up *railroads and canals, and navigation works*, the Pennsylvania Railroad Company, as counsel inform us, with a capital only half sufficient to make and equip three hundred miles, has, by contracts and "otherwise," *seven thousand miles of railroads* in its control. Safety to the country lies *in the weakness of expansion*.

What I have just said relates only to the personal estate of the United Companies, estimated at par. As to the outside real estate, I have no data before me, from which I dare estimate its value. Harsimus Cove, as alleged in the bill, and not denied in the answer, is stated to be worth \$3,000,000. Simply, for the sake of *guessing* (being well assured that I do not guess more than one-third the value) I assume that the remaining real estate, situate, promiscuously, in all the principal cities of this state, and in the cities of New York and Philadelphia, and "elsewhere," may, by possibility, be worth \$3,000,000. Adding these two items to the personal estate, the total would be \$14,385,000—not, perhaps, more than two-thirds the actual value. Looking to these figures,

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some little idea may be formed of the character and value of the corporate properties, outside of the *works* and equipments, which the Pennsylvania Railroad Company propose to take, not by direct, or specific description, but by generalities—appurtenances if you choose—as if one railroad could be appurtenant to another railroad, any more than one lot of land to another lot of land.

5. Numerous railroads, with their branches, the Pennsylvania Railroad, under the Pennsylvania acts of 1870 and 1871, proposes to take by becoming lessee by assignment, or otherwise. Those contain the power, and all the power. But if you will look at the act of 1870, you will find this important provision in it; that the roads leased or assigned, shall be “connected and continuous” roads, with the Pennsylvania road. Is the Belvidere Delaware a “connecting and continuous” road with the Pennsylvania Railroad? Is the West Jersey, or any of its branches? Is the Flemington road? Is the Jamesburg road? Do they form “connecting and continuous” lines with the road of the Pennsylvania Railroad Company? It is absurd to talk about it.

This, however, is only the *railroad* part of this scheme. What else have we? because they deal in *generalities*. They have a steamboat line from South Amboy to the city of New York. Where does the lessee get the power to take that? Does that form a connected and continuous line with the Pennsylvania Railroad? Is that a railroad? Is it a canal, or is it a *navigation work*? If it be a “navigation work,” within the act, then the Atlantic ocean is a “navigation work,” and so would anything that can be sailed upon.

Then there are shares of stock, and assets, and interests in other railroad companies; stock in passenger railway companies; bridges; ferries; turnpikes.

Such are the various kinds of property which the Pennsylvania Railroad Company proposes to take, under the power of leasing “railroads, and canals, and navigation works,” or of obtaining them by assignment, or *otherwise*.

But I have not yet named all. The Pennsylvania Railroad

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Company proposes to take under lease all the *franchises* of the United Companies, and of all the other companies; for they take by assignment, or *otherwise*. It proposes to gather in one strong, concentrated grasp, all the franchises of all the works owned and within the control of the United Companies; and what then will be the pitiable condition of those companies?

I have the high authority of the ex-Chief Justice of Pennsylvania, for saying that *franchises* are all they have. When they are gone, their all is gone; they come to a shameful end. And that, to hold otherwise, "would be to put into their right hand length of days, and into their left, riches and honor."

6. Seriously, it would seem to me but little less than absurdity, upon well established principles for construing such statutes, to adopt the construction contended for. We have the Pennsylvania statutes before us; and, under our act authorizing the reading of the statutes of other states, published by authority, they are properly here for interpretation. But we have, also, the decisions of the highest court of that state, furnishing the rules by which such statutes are, and would be construed there. We must take the statutes with the rules. The courts of the state, enacting the laws, are their proper interpreters; and, I therefore, refer to some of those decisions.

"If acts of incorporation are to be construed so as to make them imply grants of franchises, immunities, and exemptions which are not expressly given, every company of adventurers may carry what they wish without letting the legislature know their designs." *Bank of Penn. v. The Comm.*, 7 *Harris* 152.

That might have been written for our special instructor if it had not been written in 1852. I proceed:

"Charters would be framed in doubtful or ambiguous language on purpose to deceive those who grant them, a laws, which seem perfectly harmless on their face and which men would suppose to mean no more than what t

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y, might be converted into engines of infinite mischief. The legislature, without knowing or intending it, might thus be induced to disarm the state of its most necessary powers and transfer them to corporations. The continued existence of a government under such circumstances would not be of much value. There is no safety to the public interests except in the rule which declares that privileges not expressly granted in a charter, are withheld." *Ibid.*

If the gentlemen on the other side will point out to me here, in the acts of 1870 and 1871, the privileges claimed in this case are expressly granted, we will concede the point.

Now I turn to the case of *The Commonwealth v. The Franklin Canal Company*, 9 Harris 117. I read from pages 127 and 128:

"We hold," says Chief Justice Black, "without doubt or hesitation, that no railroad company can connect with a foreign railroad which meets it at the state line, unless expressly authorized by its charter, or unless such connection cannot be avoided without losing the advantage of what is clearly the best route. If this be not so, the doctrine of strict construction is a mockery. The right of determining to what extent and in what manner our territory shall be made a thoroughfare, for the benefit of foreign corporations, belongs to the state herself. It is so important to the interests of our own commerce, and the prosperity of our own public works, that no proposal to surrender it has ever been made without grave deliberation, and seldom without more or less opposition. The fiercest of our legislative struggles have been upon bills granting rights of way. The state will not be held to have parted with this right until she does so in plain words, of which the sense cannot be mistaken. It will not pass by construction as an incident of the privilege to make railroads between two designated points within the state."

In the case of *The Commonwealth v. The Erie and North-east Railroad Company*, 3 Casey 351, the same court said:

"This case requires us to give a construction to the charter

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of a private corporation. The frequency of such cases excites some surprise when we reflect that an act of incorporation is, and always must be, interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation, it may do; beyond that, all its acts are illegal. And the power must be given in *plain* words, or by *necessary* implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the Attorney-General, or anybody else, should complain against a company that keeps itself within bounds which are always thus clearly marked, and equally strange that a company, which has happened to transgress them, should come before us with the faintest hope of being sustained. In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation."

See also the case of *Packer v. Sunbury & Erie R. Co.*, 7 *Harris* 218.

I submit, without further comment, the case upon the merits.

V.

Neither the Pennsylvania Railroad Company, nor the Philadelphia and Trenton Railroad Company, is a necessary party to the bill of complaint, unless it appear by the bill, or answer, or some evidence in the cause, that they, or one of them, has some legal or equitable estate in the subject matter; or, that one, or both, would, in some way, be concluded by granting the entire relief sought; which is, simply, to enjoin the United Companies of New Jersey, and their

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directors, from executing the lease in question, on the ground that they have no legal or constitutional power so to do. Neither the Pennsylvania Railroad Company, nor the Philadelphia and Trenton Railroad Company, is charged, in any way, with having done or participated in the wrong complained of, or even advised any act whatever towards executing or sanctioning the lease in question; much less that either had executed, or agreed to join in the execution of, such a lease. Nor is it so stated in the answer; nor, so far as I know, is it true.

“ It is a rule in equity, subject to certain exceptions which will be hereafter noticed, that all persons materially interested, either legally or beneficially, in the subject matter of the suit, are to be made parties to it, either as plaintiff or defendant, however numerous they may be; so that there may be a complete decree which shall bind them.” *Story's Eq. Pl.*, § 72.

The interest required is a legal or equitable estate, or a fixed legal right; not a mere interest in the question, without such estate or right to be disturbed. If a decree can be made without affecting the rights of a person not a party, or without his having anything to perform necessary to the operation of the decree, the court will proceed without him. *Eden on Inj.* 172-4; *Joy v. Wirtz*, 1 *Wash. C. C. R.* 266.

If the lease in question had been executed, or any valid agreement made to execute it, the case would be different. Then there would be an estate, or a right fixed in the defendant. Even if it should now appear that such execution had taken place, or agreement been made, the court would not dismiss the bill or refuse the injunction; but would either require those companies to be made defendants, or allow them to appear and make defence. But the facts are the other way; nothing of the kind appears to have been done, and *quod non apparet non est*. Neither company, although having full notice, asks to appear. If they should do so, in proper form, stating sufficient interest, no objection will be raised.

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Another point was suggested by the learned gentleman, touching acquiescence. As to any acquiescence on the part of the complainants sufficient to bar their right to object, as suggested by the defendants' counsel, I forbear trespassing on the time of the court. It clearly appears, that the first and only open corporate act done by either of the United Companies, prior to the exhibition of the bill, was the passage of the resolution of the joint board that it would be expedient to lease their works to the Pennsylvania Railroad Company. The bill was exhibited, as soon afterwards as it could be prepared; certainly, within a reasonable time, considering the magnitude of the case. No corporate act, of any kind, by either the Pennsylvania Railroad Company, or the Philadelphia and Trenton Railroad Company, appears to have been done before or since.

Mr. Vanatta, for defendants.

The bill charges that the defendants intend, and are about to lease to the Pennsylvania Railroad Company, for a term of nine hundred and ninety-nine years, all of their "canals, bridges, railroads, with their appurtenances, and the floating stock, rolling stock, chattels, and other property, real and personal, of whatsoever kind, and wheresoever situate, and all the franchises, rights, and privileges of the said lessors thereto respectively belonging, or in anywise appertaining."

The prayer is that the defendants may be restrained from all further proceedings towards the "execution of the aforesaid indenture of lease, or making, or entering into any other agreement for the consolidation of the capital stocks, or business of the said United Companies, or any or either of them, with the said Pennsylvania Railroad Company; and from all further proceedings, in anywise, to grant, demise, or lease the aforesaid canal, feeder, or railroads, or their or either of their appendages and equipments, powers, franchises, or privileges to the said Pennsylvania Railroad Company;" and for other and further relief.

The only rights of the complainants, shown by their bill,

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in the property included in the proposed demise, *are those of stockholders*. Therefore, it is manifest, the complainants *can only be injured in their rights as stockholders*, and the defendants, in the present suit, can only be enjoined from doing such acts as do, or necessarily will, illegally, injure *the rights, as stockholders*, of the complainants. No matter how illegal, or in excess of their powers, any proposed act of the defendants may be, the complainants can not enjoin the doing of that thing without showing that the act will do some injury to some *private right* vested in and peculiar to them. *Irwin v. Dixon*, 9 How. 27; *M. & E. R. Co. v. Pruden*, 5 C. E. Green 537; *Buck Mountain Coal Co. v. Lehigh Coal Co.*, 50 Penn. 91; *Brown v. Monmouthshire Railway and Canal Co.*, 4 E. L. & Eq. R. 113, 124; 12 East 429; 14 Conn. 565; 7 Barr 34; 63 Penn. 127.

The defendant corporations owe two classes of duties.

1st. To the state, as the representative and guardian of the public. 2d. To their stockholders.

Their duties to the state were and are: To construct the works pursuant to the charters; to cause the works to be used for the purposes for which they were authorized to be made; to pay the taxes required by law; to obey the laws of the state in relation to the use of their property and powers.

For the violation of any of these duties, the state can only have judicial relief. A stockholder cannot maintain a suit for neglect or violation of any of these duties, unless he shows that such neglect or violation is also a neglect or violation of some of the duties which the defendant corporations *owe to him, as a stockholder*, in consequence of which he is exposed to special private damage.

The duties, owing to stockholders, are: To preserve the capital intact, and to employ it in the prosecution of the business for which the defendant corporations were established, (*Salamons v. Laing*, 6 Railw. Cas. 301; *Kean v. Johnston*, 1 Stockt. 401); to pay to the stockholder his share of the net profits, commonly called dividends.

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These are the sum total of the duties which the defendant corporations owe to their stockholders. This will be manifest from an examination of the rights of stockholders.

“A share in one of these companies may be defined to be a right to partake, according to the amount of the party's subscription, of *the surplus profits* obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted.” *Angell & Ames on Corp.*, § 557.

See also opinion of Chief Justice Shaw, in *Hutchins v. State Bank*, 12 *Metcalfe* 426.

That this was the law in New Jersey is manifest from the fact that shares of stock could not be seized, or sold on execution, until that power was conferred by statute. *Nix. Dig.* 294, §§ 7, 8.

See *Denton v. Livingston*, 9 *Johns.* 96; *Duncuft v. Albrecht*, 12 *Sim.* 189; *Tippets v. Walker*, 4 *Mass.* 596; *Bligh v. Brent*, 2 *Younge and Coll. Exch.* 268, 294; *Bradley v. Holdsworth*, 3 *Mees. & Wels.* 422; *A. & A. on Corp.*, §§ 391–3; 1 *Redf. on Railw.* 106, § 29.

I venture to say that no adjudication *in favor* of a stockholder, *against the corporation* which issued the stock, based upon the rights of the plaintiff as a stockholder, can be found, which enforces any other duty towards the stockholder than those before mentioned. If the plaintiff did not succeed in showing that one of these duties had been neglected or violated, he failed in his suit. And in this case, the injunction must be dissolved and denied, and the bill be dismissed, if the complainants have not shown:

1st. That the proposed demise endangers the safety of the capital of the United Companies; or,

2d. That using the capital of the lessors pursuant to the lease will be to cease to employ it, or to employ it in a different business than that for which the defendant corporations were established; or,

3d. That the effect of the lease will be to certainly destroy, or materially and certainly diminish their dividends.

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In support of this position, counsel cited and commented on *Gifford v. N. J. R. Co.*, 2 *Stockt.* 174; *Ware v. Grand Junction Water Works*, 2 *Russ. & My.* 470; *Ward v. The Society*, 1 *Coll.* 370; *Att'y-Gen. v. M. & L. R. Co.*, 1 *Railw. Cas.* 436; *Mangles v. Grand Collier Dock Co.*, 10 *Sim.* 519; *Illingworth v. M. & L. R. Co.*, 2 *Railw. Cas.* 187; *Kean v. Johnston*, 1 *Stockt.* 401; *Zabriskie v. Hack. & New York R. Co.*, 3 *C. E. Green* 178; *Coleman v. East. Coun. R. Co.*, 4 *Railw. Cas.* 513; *Salamons v. Laing*, 6 *Railw. Cas.* 289; *Bagshaw v. East. Union Railway*, *Ibid.* 152; *Cooper v. The Shropshire Union Railw. & Canal Co.*, *Ibid.* 136; *Foss v. Harbottle*, 2 *Hare* 461; *Lewis v. Billing*, 4 *Railw. Cas.* 414; *Gilbert v. Cooper*, *Ibid.* 396; *Bryson v. Warwick Canal Co.*, 23 *E. L. & Eq.* 91.

Now let us look into the bill of complaint, to see what *rights* of the stockholders are alleged to be threatened with injury.

The bill admits, repeatedly and in the broadest manner possible, that the capital has been, and now is, all most advantageously invested in the very works which were authorized and intended to be constructed with it.

There is no charge, or pretence in any part of the bill, that the defendants threaten, or intend to employ the capital, or the works which have been made with that capital, in the prosecution of any other business than that for which the defendant corporations were established.

The bill utterly fails to show—it does not pretend—that the proposed demise endangers the safety or security of the capital, or works, or property of any kind, of the lessors. Nor does the bill show, or pretend, that there is any intention, or that the effect of the lease will be, to cease to employ the capital or property of lessors in the business, or to employ it in any different places, than those, to carry on which the defendant corporations were established.

It therefore follows that the complainants cannot possibly be injured, unless it is in respect of dividends.

The bill does not allege or pretend that there is any

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intent to destroy, or danger or probability of *destroying* the complainants' dividends. On the contrary, it shows a guaranty of and security for dividends of ten per cent. per annum, payable quarterly.

It does not charge or pretend, that there is danger that the dividend of ten per cent. per annum will not be paid pursuant to the terms of the lease.

The complaint, then, if anything, is that their dividends, hereafter, under the lease, *will not be as great* as they will be if the lease is not made.

The complainants make no complaint that there has been any mismanagement; they laud it. They say that the dividends have, heretofore, been twelve and twenty hundredths per cent. per annum, on the stock; and then, they say that they *believe* that, with like management and care for a coming period of thirty-eight years, average dividends of at least fifteen per cent., may be rationally and confidently expected.

No reason for this belief is given, except that dividends, averaging twelve and twenty hundredths per cent., have heretofore been paid. That single fact warrants no such conclusion. The bill and the legislative acts which it refers to, show that the monopoly which the defendants so long enjoyed, expired in 1869. The statute books show that authority to build railroads in every part of the state, has been freely granted. The official reports, made to and published by the legislature, show that those powers have been extensively used. The New Jersey West Line Road, a new line across the state, striking the Delaware below Phillipsburg, is now in actual course of construction. What is known as the "Air Line Road," a road intended for direct and immediate competition with the United Companies, between New York and Philadelphia, has been so long agitated that its authorization can not be much longer prevented. Nothing but the consummation of this lease can prevent it; and even that will only postpone it a little longer. A very considerable amount of the newly con-

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structed roads is used in competition with the roads of the defendant companies. That is more particularly the case in the vicinity of Elizabeth and Newark. But the whole exterior business of the company, for years, has been in sharp competition with the great through lines in the state of New York, and the Central Railroad Company of New Jersey. That competition will become sharper and more depressing upon profits every year. Besides that, the capital of the defendant corporations has very largely increased. In 1853, the stock of the Joint Companies was \$3,000,000. Their funded and other indebtedness, \$7,835,400. Making the aggregate capital invested, \$10,835,400. In 1866, their total capital invested was \$18,169,549.50.

In 1867, the capital invested by the United Companies was \$28,169,549.50. In 1870, three years afterwards, it was \$35,853,467.16, an increase, in three years, of \$7,683,917.66. Besides that, it is contemplated, and it is necessary, for the purpose of improving the Harsimus cove property, to immediately add to the stock \$2,250,000. The development and improvement of this property is a necessity, whether the lease be made or not. That will make the capital invested nearly thirty-three per cent. greater than it was in 1867.

Now, in view of the increased and increasing competition, and in view of the great increase of capital invested, is there any reason to expect larger dividends in the future than in the past? Are not much smaller dividends an *unavoidable necessity*? Large masses of capital have never made and never can make, as large a *per centage* of profits as a smaller amount of capital employed in the same business.

But the proposed lease violates no right of the complainants in respect to dividends.

The general principle, apart from charter or statutory regulations, is that a court of equity will not compel the directors of a corporation to declare dividends out of the surplus earnings, unless they refuse from a willful abuse of

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their discretion; nor will the court interfere with the discretion of the directors as to dividends, unless it appears that they are acting in bad faith, or with extreme negligence.

2 *Redf. on Railw.*, pp. 336, 337; *Stevens v. The South Devon Railway Co.*, 12 *E. L. & Eq.* 237; *Brown v. Monmouthshire Canal Co.*, 4 *E. L. & Eq.* 124; *Barnard v. Vermont & Mass. R. Co.*, 7 *Allen* 512; *Angell & Ames on Corp.*, § 314.

The Court of Chancery cannot be the administrator, or manager of the internal affairs of the numerous private corporations of the state. It can and will intervene, only in cases of *fraud, accident, or mistake*.

By the respective charters of the several companies composing the United Companies, the matter of dividends was confided entirely to the discretion of the directors of each company.

It is, therefore, very clear that there can be no relief against the directors, or the corporation, in respect to dividends, unless it be grounded upon the fraud or gross negligence of the directors, or the corporation. Stockholders can only recover such dividends as have been declared by the corporation; and the directors, or corporation, if acting in good faith, cannot be compelled to declare any more, or greater dividends than they, in their discretion, think most advantageous to the best interests of the corporation.

In this bill there is no charge of fraud against the directors, or any of them. There is no imputation of any fraudulent intent or scheme, whatever. The utmost of the charge is that the complainants *believe* that the defendants have erred in judgment as to the quantum of future profits. I trust that I have shown that that belief is unfounded. Therefore, all ground for interference on account of the dividends fails.

On the other hand, the answer shows that, in making the lease, the defendants have been prompted entirely by a desire to secure to the stockholders, permanently, the largest possible profits, and that in their judgment the lease achieves

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that result. Their motive was to secure, permanently, to the stockholders, a larger profit on their capital than can or will be secured without the lease. Their reasons for accepting ten per cent. per annum, for a thousand years, save one, were: 1. The capital stock has increased from \$2,750,000 to \$20,249,797.50. 2. The capital, to make the improvements at Jersey City, and to improve and enlarge the capacities of the works of other places, will require the capital stock to be increased several millions of dollars, it will not be rash to say, at least \$5,000,000. 3. The old loans, which were negotiated in foreign markets at what, to us, were low rates of interest, have fallen and are falling due. To renew those loans, bonds have to be negotiated at higher rates of interest, and at large discounts from the face of the bonds. Thus, while the stock, in amount, is more than six times greater than it formerly was, the interest on the other indebtedness consumes a larger per centage, and a larger amount of the earnings, than formerly. 4. That the wages of all kinds of labor, and the cost of all kinds of materials used by the companies, have greatly increased. 5. That, owing to the great competition in business to which the defendants have been subjected, the rates of fare and freight have been very much reduced. The almost certain prospect is that, hereafter, competition will be very much increased, and fares and freights still further reduced. 6. Already these and other causes have reduced the profits of the defendants, upon the whole capital invested, to seven and twenty-six hundredths per cent. per annum, and upon the capital stock to less than ten per cent. per annum. 7. That without the lease, the causes aforesaid, and others, will still further reduce the profits upon the capital employed. 8. The legal as well as the average rate of profit (interest) on capital does not exceed seven per cent. The capital is subject to taxation for municipal, county, and state taxes. The interest is subject to the United States income tax. These taxes reduce the net interest to at least five per cent. The lease in question secures to the stockholders an interest of

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ten per cent. per annum, "free and clear of and from all taxes, charges, and assessments whatsoever, now existing, or hereafter to be imposed by lawful authority upon the said corporations lessors, their respective franchises and property, including all income tax of the United States."

This lease, then, secures to the complainants double the average rate of interest. The complainants retain all the security they heretofore had for the payment of their dividends, and in addition to that they have the covenant of the wealthiest corporation in America. Besides all that, if the lessees fail to pay the rent, or to keep any of their covenants contained in the lease, the lessors may re-enter, evict the lessees, and re-possess the whole property, as if the lease had not been made.

The bill charges that the making of the lease and delivery of the demised property, would be a virtual dissolution or extinguishment of the United Companies, and the substitution of the lessee to take the property and execute the powers and duties of the defendant corporations, without the consent of the stockholders, and without compensation to the stockholders whose property should thereby be taken, endangered, or destroyed. That the defendant corporations are the trustees of the stockholders, and that the effect of the lease will be to substitute the lessees to that trust.

I answer, that the lease will not operate as a dissolution or extinguishment of the United Companies, or of the corporations composing that union. The lease is made subject to the proviso, "that nothing herein contained shall be deemed or taken, in any manner, to affect the right of corporate existence of each of the lessors, parties hereto, or such powers and franchises of which the exercise may from time to time be necessary *to protect the interests of their respective stockholders*, according to the true intent and meaning of these presents." Again, *the title* to all canals and railroads used for transportation between New York and Philadelphia, hereafter acquired by the lessees, shall be taken in the name of the lessors, or of some of them. Besides, the lease

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makes provision to "enable the said lessors to keep up and maintain their corporate organizations." The twelfth paragraph provides that "the accounts to be kept by the said lessee, of the works and property which form the subjects of this lease, and of the business thereof, shall, at all reasonable hours and times, be open to the inspection and examination of the *president*, or *presidents* of the said lessors, and each of them, and of such other person or persons as the said lessors shall, from time to time, by resolution of their directors, appoint to examine the same."

These and other provisions of the lease repel any idea of any *intent* to dissolve or extinguish the leasing corporations, and thus show a clear purpose to maintain these corporations in full efficiency, and with undiminished powers.

The bill does not charge that these provisions, for maintaining the existence and vigor of the leasing corporations, are not made in good faith.

Nor is it a natural or necessary effect of the demise, to dissolve or extinguish the leasing corporations. An absolute sale and conveyance of all their property would not work a dissolution of the lessors. Much less will a lease.

Dean & Chapter of Norwich's Case, 3 Coke 75; *Brinckerhoff v. Brown*, 7 Johns. Ch. Rep. 217; *Angell & Ames on Corp.*, § 773.

This lease is not an alienation, in the ordinary acceptation of that term. It is rather an arrangement by which the demised premises are to be operated for the benefit of the lessors.

The lease negatives any intent to part with, or surrender the property or powers of the lessors, or to part with the control of either, or to apply them to any other uses than those intended and directed by the charters, or to cease to employ the property, powers and privileges for those uses, or to omit, or neglect the performance of any duty owing to the public, or to the stockholders.

The right of the complainants to vote upon their stock, to have their capital preserved, to have it employed in the

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business for the prosecution of which it was invested, and to have their shares of the profits of the business, are not only not disturbed, but are preserved, protected and strengthened. So far as the stockholders are concerned, this is the full measure of their rights.

The lease shows no intent to omit the performance of any duty incumbent on the defendants. It shows a clear intent and purpose to perform every duty in the fullest manner.

It does show, however, an intent to employ the Pennsylvania Railroad Company as an agent to aid in the performance of those duties. There is no intent on the part of the lessors, to discharge or exempt themselves from liability for the performance of any of their duties. On the contrary, their liability is to remain undiminished and unaltered. They merely make an agent and an assistant of the lessee, and, to some extent, add its liability and responsibility to their own.

The defendants are unrestricted as to the agencies they shall employ to operate their works.

The only apparent exception is that a majority of the directors of the "*Joint Companies*," shall be citizens of this state. That requirement is not in the charter of the New Jersey Railroad Company.

The powers of the boards of directors as to the management of the property and affairs of the company, are very broad. *Charter of Canal Co.*, § 7; *Charter of Camden & Amboy R. Co.*, § 6; *Charter of N. J. R. Co.*, § 5.

The agencies to be employed are what shall *be necessary*, and the boards of directors are the sole judges of what is necessary or expedient.

The complainants, as stockholders, are entitled to no direct voice in the management. The boards of directors are not agents. The board is an organ of the corporation. The corporation is the principal. The board is the organ by which it forms and makes known its will, and by which it makes its appointments and contracts. None of the duties

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which the lessee undertakes to perform are judicial in their nature, but all of them are and every one is such as may be performed by an agent. "Whatever a man has power to do in his own right, he may (except in one or two very particular cases,) appoint an agent to do for him." *Smith's Mercantile Law*, 93; *Clement v. Canfield*, 28 Vt. 302; *A. & A. on Corp.*, § 162, (9th ed.); § 191, (7th ed.)

This is peculiarly the case with a corporation, because it can only act by its appointed agents. And one corporation may be appointed to and act as the agent of another corporation. This is being done all the time, everywhere, and in every department of business. The charters of the defendants contain no restrictions or directions as to the agents they should employ, except that they "be required to transact the business of the company." The Pennsylvania Railroad Company—a single person—can operate all the works of the defendants. If the defendants can appoint and employ, as undoubtedly they can, a thousand natural persons to operate their works, why may they not employ one artificial person to do the same thing? And why may not that artificial person be paid for the service by allowing it a share of the earnings?

See the *Sussex R. Co. v. Morris & Essex R. Co.*, 4 C. E. Green 25.

But it is said that the Pennsylvania Railroad Company has not the right or power to receive, hold, or use the property and rights demised to it.

That depends upon whether that power has been conferred upon it by the power which created it—the state of Pennsylvania.

Angell & Ames on Corp., § 162; *Bank of Augusta v. Earle*, 13 Pet. 519; *Runyan v. Coster*, 14 Ibid. 192; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; 2 *Kent's Com.* 282, 283; *Lathrop v. Commercial Bank of Sciota*, 8 Dana 114.

As a matter of fact, the state of Pennsylvania has con-

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ferred that power in full, clear terms. *Laws of 1870, pp. 31, 1274; Laws of 1871, May 3; 53 Penn. St. R. 57-8.*

In this state there is nothing preventing or prohibiting the lessee from taking, holding, and using the demised premises.

The spirit and policy of our laws have favored corporations of other states holding real estate in this state. Thus, any alien may purchase lands, &c., within this state, and hold the same to him, his heirs and assigns. *Nix. Dig., p. 6.* An act approved March 2d, 1849, provides that so much and such parts of the "several acts of incorporation in this state as prohibit stockholders residing out of the state from voting on stock held by them, are hereby repealed." *Nix. Dig., p. 169.*

The defendants may have their offices, hold their business meetings, and books, out of the state. *Ibid., p. 169.*

Besides, there are many special acts authorizing corporations of other states to hold lands, and exercise and enjoy New Jersey franchises in this state. As, for instance, the Erie Railway Company, the Delaware, Lackawanna and Western Railroad Company, the Allentown Iron Company, and many others. Every statute which authorizes a corporation of this state to mortgage its property and franchises, and makes no restriction against mortgaging to a foreign corporation, (and none of them make such a restriction,) in effect, authorizes any corporation which may become the mortgagee, in case of non-payment, to hold the mortgaged premises. By authorizing a mortgage of the property and franchises of the United Companies, as the legislature did in 1868, (*Laws 1868, p. 1039, § 5,*) it, in effect, authorized the transfer of that property and those franchises to whatever corporation, domestic or foreign, might become the owner of the bonds.

Moreover, as the controlling power of every private corporation is in the ownership of its stock, and as our laws make no restriction on foreign corporations from acquiring the ownership of the stock of our corporations, or against

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voting on it, foreign corporations are perfectly free to own and control any and all of our corporations and their property. In this way, the controlling power in the affairs and over the property of the United Companies, has long been vested in persons who do not reside in this state.

Any distinction, in this respect, between domestic and foreign corporations (so long as they are corporations of some state of the Union), is useless and senseless, so far as railroads or canals are concerned. The property of such corporations is local. All the franchises in relation to them must, necessarily, be exercised locally. The property and its use must be regulated by the laws of this state, no difference in what form, or in what place, questions respecting it arise.

A. & A. on Corp., § 163; *Binney's case*, 2 *Bland* (Md.) 142; *Farnum v. Blackstone Canal Co.*, 1 *Sumner* 46; *Smith v. Kernochen*, 7 *How.* 198; *Black v. Zacharie*, 3 *How.* 483, 511.

That distinction *is contrary to the spirit* of Art. IV, § 2, of the Constitution of the United States—which provides “that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

But, if we assume that the execution of the lease will be to appoint the lessee to perform and execute all the powers, and discharge all the duties, trusts, obligations, contracts, and other liabilities of the defendants, how will that injure the complainants? The appointment cannot be made without the consent of at least two-thirds of the stockholders—a consent which has already been given. If the lessee *does* perform and execute all the powers, and discharge all the duties, trusts, obligations, contracts and other liabilities of the defendants, then, surely, the complainants will not be injured. If they do not perform, then they can be expelled, under the provision of the lease.

But it is said that the complainants are not bound to confide the performance of those duties to the lessee, even as an agent of the defendants, for a single hour. The answer is, that they are bound to submit to having the duties of the

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defendant corporations performed by such agents as the boards of directors shall appoint, and the power of electing the directors is absolute in the holders of a majority of the stock. The supreme and final power—the boards of directors, and their constituents, a majority of the stockholders—having made and assented to the appointment, the court cannot relieve the complainants in this respect, unless it can decree the choice of the directors and the appointment of the agents of the corporation to a small minority of the stockholders. This the court cannot do, because it was a part of the contract upon which the stock was taken, and it has ever been held that the holders of a majority of the stock should have the selection and appointment of the directors, and, through them, of all other agents of the corporations.

If it be said that the lease will prevent the appointment of other agents to operate the works of the defendants, and prevent a change of the mode of managing the business of the companies, in case another set of directors with different views—with views, if you please, similar to those entertained by the complainants—shall hereafter be elected, I answer that that will deprive the complainants of no rights they now have. They are in the minority. The right and power to elect the directors is in the holders of more than two-thirds of the stock, who have already waived the right to change the operating agent and the mode of carrying on the works, so long as the lessee fulfills the terms of the lease. It is a right inherent in a majority of the stock, to change the agencies for, and the mode of managing the property and affairs of the company. But that right, like any other right of property, may be limited and qualified by the owner thereof, and such limitation or qualification will attach to the stock now held by the consenting stockholders, in whose hands soever that stock may hereafter be.

See *Gifford v. The New Jersey R. & T. Co.*, 2 Stockt. 172; 5 *Railway Cas.* 241; *Zabriskie v. Cleveland, &c.*, 23 *How.* 381.

In the case now before the court, the consent given by more-

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than two-thirds in interest of the stockholders to the lease, binds those who gave it, and that consent must, hereafter, bind the assignees of those who gave it. Therefore, the agencies for operating the works and transacting the business of the defendants, provided by the lease, so long as the terms of the lease are performed by the lessee, can remain unaltered without depriving the complainants of any right.

There is no charge, allegation, or pretence in the bill, that a majority, or any near approach to a majority, of the stockholders of the defendant corporations agree, or will co-operate with the complainants as to the agencies by, or the policy upon which the property and business of the defendants shall be managed.

The pleadings show that the power of appointing the agents and prescribing the managing policy of the defendants is not now in the complainants, or in any, or all of them together, and that, therefore, in that respect, the lease, if executed, can do *them* no harm. The essence and value of the shareholder's right to vote upon his stock, consists in the power to thereby influence the selection of the agents by, and the policy upon which the affairs of the corporation shall be managed. If those in whom that power and right is vested make an agreement, fixing permanently the operating agents and managerial policy of the corporation, the agreement is within their power to make; it does no illegal injury to any one, and is binding on the rights and interests of those who made it, and the corporations.

The lease, if executed, will not take from the complainants, without their consent, any of their property, or rights, for public or private use, nor with or without compensation.

The bill impliedly charges that the act of 17th March, 1870, authorizes, and that the proposed lease, if executed, will *compel the dissatisfied stockholders* to give up their stock to defendants, and that that is a taking of their stock for private use.

The complainants are not, in any sense, the owners of the

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lands, franchises, goods, chattels, or choses in action of the United Companies, or any of them. Their sole estate is a right to share in the net profits of the business of the defendants, that is, in the net profits of the business of transportation. The railroads, canal, rolling-stock, and other property of the defendants, are mere instruments by which they carry on that business, and the defendants are the sole, legal, and equitable owners of all and every of those instruments. In no court could the complainants recover possession of those instruments, nor recover damages for injury done to them, or any of them. For a trespass on any of those instruments the complainants, or any of them, could not maintain an action; nor, at their suit, would this court order an injunction to prevent or abate a nuisance, injuriously or wrongfully effecting any of those instruments. If any of those instruments, real or personal, be taken for public use, by virtue of the right of eminent domain, the damages would be assessed and paid to the defendants, and could not be assessed or paid to the complainants, or any of them. All this is because the stockholders are not the legal or equitable owners of any of the property of the defendant corporations.

This is made very manifest from the fact that if the complainants were to secede, and be erected into a new corporation, they could not take with them, or have a division of, the defendants' property, but the defendants would retain it all, notwithstanding the secession.

Angell & Ames on Corp., §§ 194, 557, 312; *Arnold v. Ruggles*, 1 *Rhode Island* 165; *Wells v. Rahway White Rubber Co.*, 4 *C. E. Green* 402; *Van Houten v. First Reformed Dutch Church*, 2 *C. E. Green* 126; *Story v. Jersey City & Bergen Point Plank Road Co.*, 1 *C. E. Green* 14, &c.; *Charter of Del. & Rar. Canal Co.*, § 17; *Charter of C. & A. R. Co.*, § 16; *Charter of N. J. R. & T. Co.*, §§ 6, 10.

What the lessee is to take under the lease, therefore, is not *the property of the complainants*, but the property, in law and in equity, *of the defendant corporations*. Nor is

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the taking such as will deprive the defendants of the legal or beneficial ownership of the property taken. The taking is to be such as the taking of the tenant from the landlord; and the holding is to be in subordination to the paramount rights of the landlord and for the benefit of the lessors and lessee.

From the complainants nothing is to be taken. Their title to their stock is not to be disturbed; their right to vote upon it will be as perfect and as unimpaired as ever it was; their right to dividends is not to be taken; and actual, unusual, extraordinarily large dividends, instead of being taken from, are to be paid to them. There is nothing authorizing the lessors, or the lessee, to take the complainants' stock without their consent, and there is no intent, purpose, or desire to take it from them in any way. If there had been an agreement *to consolidate* the stock of the lessors with that of the lessee, there might then be some ground for saying that the taking of the complainants' stock is contemplated; but there is no agreement *to consolidate*. The agreement is for a *connection of business*, which in no way requires or implies the taking of the stock of any stockholder.

The leasing act of March 17th, 1870, in effect, provides that if any stockholder *does not like the policy*, or the mode of leasing, he *may* withdraw from the corporation, and if he elects so to do, the corporation is *compelled* to buy his stock and pay him *the full value* thereof, immediately prior to the lease. This is nothing but a *privilege*, extended to the discontented stockholders, *at the expense* of the corporation. This provision is *entirely gratuitous*. The right of appointing the managers and agents of the corporations, and through them, of directing the management and policies of the corporations, is, by the charters and fundamental principles of the corporations, vested in a majority of the stockholders. To require the corporation to buy out the stock of those holders who are in the minority, when the majority exercise their clear, undoubted rights of appointing

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managers and prescribing how the works, &c., shall be managed and operated, is very generous and gracious to the minority, and onerous—oftentimes oppressive upon—and unjust to, the majority. *Gen. Stat. of Vt.* 233, § 82; *Laws of Penn.* (1870) p. 31; *Ibid.* (1871) p. 1274; 30 *Penn.* (6 *Casey*) 42; *Stat. United King.*, vol. 25, p. 819, § 161.

But the act and case in question furnish *complete indemnity* to the complainants and every of them. If they are satisfied with the lease they will not seek to compel the defendants to buy their stock. If any of them is dissatisfied with, or does not chose to run the risks of the lease, he can *compel* the defendants to buy, *at the full value of the stock immediately before its value was in any way impaired by the lease.*

There is, therefore, no taking without the consent of the stockholder, of any of *his* property or rights, and the complaint, in that respect, is unfounded in law or fact.

The act of March 17th, 1870, is not unconstitutional.

Counsel here answered, *seriatim*, the reasons assigned in the bill, why the act of March 17th, 1870, is unconstitutional.

He then proceeded :

The precise and only constitutional question then is, whether it was competent for the legislature to authorize the defendants to lease their works and privileges.

I regard that question as not open to discussion. That power has been so long and so often exercised, and such vast interests are founded upon it, that it should be regarded as beyond dispute. Every case upon the subject of leases of the property and franchises of a quasi public corporation, has asserted or admitted the power of the legislature in this respect.

The *only* reasons for requiring a legislative authorization, or validation, are of a political or public nature. So far as leasing involves the right of property, and the transfer of it, the power of alienation is complete. It is inherent in every

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corporation. Leasing without legislative authority can not, *of itself and alone*, injure the stockholders. It is only when the leasing without authority injures some *private right* of the stockholder that he can be relieved. I think no case can be found where a court, at the suit of a stockholder, on his rights as such, has set aside a lease, or enjoined the execution of one, on the *single, sole* ground that there was not legislative authority to make it. There are cases where the court has refused to *enforce or carry out such a lease*—that is, to give relief founded upon it. That is as far as they have gone. The practical importance of that is this, that the want of legislative authority does not, *of itself and alone*, entitle the stockholder to be relieved against the lease. To have relief, he must show that the lease will impair some of *his* rights as a stockholder, *i. e.*, injure *his* property. If he shows that, and shows that the lease impairs the contract between him and the corporation, without his consent, then he can be relieved, although the legislature has authorized the lease. See *Zabriskie v. Hackensack & N. Y. R. Co.*, 3 *C. E. Green* 178.

When there is no wrong alleged against a lease, except the want of legislative authority to execute it, it can only be set aside, or its execution enjoined, at the suit of the state. This must be so, because the wrong, in that case, concerns the public only. *Brown v. Monmouthshire Canal Co.*, 4 *L. & Eq.* 124.

This view of the matter answers the question whether the validity of a legislative act authorizing a lease depends upon its being consented to by the stockholders. Manifestly it does not, because the whole object and only efficacy of the act consists in its being a *waiver* of all the *political* and *public reasons* which there may be against the lease. As to these, the consent of the stockholder amounts to nothing. He is not the custodian or guardian of the policy of the state. The validity of a legislative act can not be dependent upon such consent. So far as the stockholders' rights are concerned, there is no need of any legislative act.

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If he gives *his* consent to the lease *he* is bound thereby as effectually, if there be no legislative act, as if there is one. It is *his consent*, and not the act, which binds him. So, if the lease does not impair the contract rights of the stockholder, it is good against him, and his consent is unnecessary. If it does impair his contract rights and he consents to it, then he is bound whether there be an act of authorization or not.

Hence the constitutionality of the act in question is of no practical importance in this suit, beyond the fact that it shows that all public objections have been waived. It is a part of the legislative history of the state, that, last winter, petitions were presented to the legislature to repeal the act of 17th March, 1870, on the ground that the defendants were about to lease their works, by virtue of that act, to the Pennsylvania Railroad Company. The legislature did not grant the prayer of the petitioners; in other words, the legislature acquiesced in making the lease.

The real and only question in this case is, whether the proposed lease impairs any contract with the complainants, or otherwise unlawfully injures them in respect of their stock. Already, I trust, I have shown that it does not.

The proposed lease is authorized by the act of 17th March, 1870.

The act does not *confine* its powers to New Jersey corporations, nor is there anything in it showing that such was the legislative intention or meaning. The act *meant* to extend its privileges *beyond* New Jersey corporations, as shown by these words: "With *any* other railroad or canal company or companies in this state, or otherwise." That is to be understood as if it were "companies created by this state or otherwise;" that is, with any railroad or canal company in what manner soever created. This is made clear by subsequent words descriptive of the grantee, thus:

"With which they (United Companies) are or may be

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identified in interest, or whose works shall form, with their own, continuous or connected lines."

The preamble says that the United Companies "have an identity of interest with the Philadelphia and Trenton Railroad Company, and other companies."

The corporation last named is a Pennsylvania corporation. It will not be disputed but that the act authorizes a consolidation, &c., with that company. This is certain, because the leave is to consolidate, &c., with *any* company with "which they are or may be identified in interest;" and then the preamble says that a certain Pennsylvania corporation is one with which they are identified in interest. It is, therefore, manifest that the legislature did not mean to *confine* the act to New Jersey corporations, *nor to exclude* Pennsylvania corporations.

The only other question on this point, then, is one of fact, namely, whether the defendants are identified in interest with the Pennsylvania Railroad Company, or whether the works of the last named company form, with the defendants' works, continuous or connected lines.

Counsel here showed the identity of interest, by the agreements between the lessors and lessee; and showed further, that the lines were continuous and connected.

The lease, as against the complainants, is good, independent of the act of 17th March, 1870.

Admitting, for this occasion, that the defendant corporations can only exercise the powers conferred by statute on all corporations (*Nix. Dig.* 167-8, §§ 1, 2 and 3,) and in addition thereto those expressly given in its charter, and such as are necessary to the exercise of the powers so enumerated and given, there would seem to be no lack of power, as between the defendants and their stockholders, to execute the lease and carry it into effect. By the general statute, "*every* corporation, *as such*, shall be deemed to have power to *hold, purchase, and convey* such real and personal estate, as the purposes of the corporation shall require, not exceed-

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ing the amount limited in its charter." The right to *convey* is as extensive as the right to *hold*. . Whatever the corporation has the power to *hold* it has the power to *convey*. If the defendants did not have the power prior to 1846, they have had it ever since. Every person who has taken stock in any of those companies since 1846, has taken it upon and subject to that condition. The complainants do not allege that any of them were stockholders prior to 1846, nor that any of the stock they hold was subscribed for, or issued prior to 1846.

The charter of the Canal Company, § 2, gives that company capacity "of purchasing, or of otherwise receiving and becoming possessed of, holding and *conveying* real and personal estate."

The charter of the Camden and Amboy Railroad Company, § 2, confers the same power, in the same words. .

The charter of the New Jersey Railroad and Transportation Company, § 2, also confers the same power, in the same words.

As to the corporeal hereditament of the defendants, their power of alienation, subject to the exceptions hereinafter alluded to, is undisputed.

Zabriskie v. Hackensack & N. Y. R., 3 C. E. Green 194; *Angell & Ames on Corp.*, §§ 187 to 191; *S. & B. R. Co. v. North West. R. Co.*, 6 H. L. Cas. 135.

Subject to the qualifications hereinafter stated, the power to alienate the franchises would seem to be undoubted. As between the corporation and the stockholders, in respect to the power of alienation, there is no difference between the franchises and the other property of the corporation. The stockholder, as such, has no interest in the franchises except as property. They are of no account to him except as they effect the value and productiveness of his stock.

Angell & Ames on Corp., § 4; 3 *Cruise's Dig.* "Franchise," § 14; 9 *Coke* 27 b; 3 *Kent's Comm.* 458-9; *Brown's Leg. Max.*, pp. 336-7.

The *general* power and right of alienation being clear and

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undoubted, it remains to inquire what restrictions there are upon that power and right.

They may be divided into two classes: 1st. Those which are for the benefit of the stockholders. 2d. Those which are for the benefit of the public.

As to the first, they are only such as are necessary to secure the rights of the stockholder, as such. An out and out sale, in many cases, fairly made, would not necessarily or materially *endanger the capital*, and the stockholder could not object on that ground; but where the capital, as in this case, is invested in works which can neither exist, nor be used in any other place, then an absolute sale would prematurely break up and terminate the enterprise in which the capital was invested, and cease to employ the capital in that business. Such an alienation, according to *Kean v. Johnston*, could not be made. It would be a violation of the implied contract *to continue to employ the capital* in the business for which it was invested. But the lease in question is not subject to that objection, because the effect of it will not be to cease, but to continue to employ the capital in the very business for which it was invested, and to employ the very instruments which have been purchased with that capital, and that, too, for the benefit of the stockholders.

I have already shown what the rights of the stockholders are. I have also shown that the lease cannot injure any of those rights. Therefore, in behalf of the stockholder, there is no restriction upon the defendants' power to make the lease, because such restriction is *not necessary* to protect any right belonging to the stockholder, as such. Nor can he, on the footing of that right, enjoin its execution, because he is not injured.

The stockholder who shows no injury to his rights to arise from the lease, cannot prevent its execution, on the mere ground that the legislature have not authorized it to be made. The state may waive its objections, or acquiesce in the lease, or validate it hereafter, if it had not been authorized in advance.

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This is illustrated by the case of *Runyan v. Coster's Lessee*, 14 *Peters* 122. There, land in Pennsylvania had been conveyed to Coster and others, in fee simple, in trust, declared in the deed, to the sole use of the stockholders of a corporation created and existing by the laws of New York, called the New York and Schuylkill Coal Company. Runyan was in possession. Coster and his co-trustee brought an action of ejectment, in the Circuit Court of the United States, Eastern District of Pennsylvania, to recover possession of that land. Verdict and judgment for plaintiffs. The defence was based upon a statute of Pennsylvania, which recites that it is *contrary to the laws and policy of Pennsylvania* for any corporation to prevent or impede the circulation of landed property from man to man, *without the license* of the commonwealth. And its enactments prohibited *any* corporation to purchase lands within that state, under penalty of forfeiture of the lands to the commonwealth, unless such purchase should be sanctioned and authorized by an act of the legislature. This was the ground upon which the writ of error was prosecuted in the Supreme Court of the United States. The court held, upon the authority of *Lazure v. Hillegas*, 7 *S. & R.* 313, and *Fairfax v. Hunter*, 7 *Cranch* 621, that the right of a corporation, in this respect, was like that of an alien, who has power to *take*, but not to *hold* lands; and that, although the land thus held by an alien *may* be subject to forfeiture after offence found, yet, until some act *is done by the government*, according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser; but he can convey no estate which is not defensible *by the commonwealth*. The judgment was affirmed.

This case shows that the mere want of legislative consent cannot be set up as a substantive ground of defence or relief, by a private citizen, in a suit to enforce or protect a mere private right.

This is a safe, sensible, convenient and practical rule. Why should a private citizen set up such an objection when

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he does not show that it has injured, or can injure, any private right of his? The question of *ultra vires* has arisen in a great many cases founded upon leases of railroads and canals, but comparatively few of them have been at the suit of a stockholder; and in no case of that kind that I have found has the stockholder been relieved on the bare ground that the lease had not been authorized or sanctioned by the legislature, but the relief, in every case where granted, has been that some right of the stockholder, in respect of his stock, has been injured, or was threatened with it.

There is one apparent exception—*Winch v. The Birkenhead, Lancashire & Cheshire Junc. R. Co.*, 13 *E. L. & Eq.* 506—decided by Vice-Chancellor Parker, in 1852.

The point I now make does not appear to have been made by anybody in the case. The counsel who supported the bill relied only on the allegation that the agreement was illegal and beyond the power of the defendants to make. They said the case fell precisely within *Beman v. Rufford* 6 *E. L. & Eq.* 106. But *Beman v. Rufford* was put on the ground that the agreement complained of required the funds of the corporation to be laid out in the doing of a work not authorized by its charter. The whole point of the case and foundation of the judgment were, that the defendants were going to apply the corporate funds to construct unauthorized works.

Winch's case seems, if correctly and fully reported, to stand alone, and to have been imperfectly considered.

No private citizen, suing on his own behalf, can have judgment in his favor, in any court, by merely showing that the defendant has done, or intends to do wrong. To recover, he must go farther, and show that the wrong of which he complains has injured, or will injure, some private right belonging to him. This is a fundamental, unquestionable maxim of law and equity. As the dictum in Winch's case is contrary to this maxim, the case is wrong, and is not authority.

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To the point that the protection or advancement of the political and public policy of the state, by the court, in a matter of this kind, can only be invoked by the state herself, acting in her own name and by her own officers:

See opinion of C. J. Taney in *Bank of Augusta v. Earle*, 13 *Peters* 291; *Buck Mountain Coal Co. v. Lehigh Coal Co.*, 50 *Penn.* 91; *Ex parte Painter*, 2 *C. B., N. S.*, 702; *Mayor v. Pemberton*, 1 *Swanston* 260; *Drewry on Inj.* 287; *Lee v. Milner*, 2 *Y. & Coll. Ex.* 611; *Solamon v. Randall*, 3 *M. & C.* 444; *Wynne v. Lord Newborough*, 1 *Ves., Jun.*, 164; *Babcock v. N. J. Stock Yard Co.*, 5 *C. E. Green* 296; *Rogers' Locomotive Works v. Erie R. Co.*, *Ibid.* 385; *Morris & Essex R. Co. v. Pruden*, *Ibid.* 530; *Mills v. Northern R. of Buenos Ayres*, *Law Rep.*, 5 *Ch. App.* 621; *Ware v. Regents Canal Co.*, 3 *De Gex & Jones* 212.

In view of the fact that the intent to make this lease was generally known last winter, and the legislature was petitioned to take action to prevent it, and declined to do so, I assume that the Attorney-General has not felt, and will not feel, at liberty to use the name of the state as a suitor to oppose this lease. At any rate, he has not done so.

The state is not a party to the suit in any form. The state director is not even a stockholder, and is by law prohibited from being one. *Nix. Dig.* 636. If it be said that he represents in the "United Board," the stock of the state, I answer that, as a stockholder, the state has no *greater, other, or different rights* than any other stockholder. *A. & A. on Corp.*, § 32, and cases there cited.

The bill in this case, I suppose, was hoped to be supported by the cases of *Kean v. Johnston*, and *Zabriskie v. Hackensack and New York Railroad Company*; but I trust and submit, that I have showed that the complainants have failed to show that they are in any danger of either one of the injuries, protection against which the court granted in those cases. The enterprise in which they invested their capital is not to be broken up and summarily ended, as was the fact in *Kean's* case, nor is their capital to be employed in the

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construction and support of works largely extra of what were embraced in the undertaking when they became stockholders, as was the injury in Zabriskie's case.

Here, the whole solicitude of the complainants is about the management of the works, for the purposes and within the limits of the charters and the accepted supplements thereto. The ruling in *Natusch v. Irving*, (*Gow on Part. App.* 398,) in *Kean v. Johnston*, or in *Zabriskie v. Hackensack and New York Railroad Company*, does not apply to the complainants' case, nor reach their difficulty. On a question of internal management they have the misfortune to hold but a small minority of the stock. The only relief they need, and all that can be of any avail to them as to the internal management, is to get a majority of the stock. The court can not furnish them with that. Even if it could, it would now be committed to the lease, and the new holders could not rescind the consent previously given. *Great West. R. Co. v. Birm. R. Co.*, 5 *Railw. Cas.* 241.

In case of partnerships, as a necessary incident, the majority must control the management of its affairs. *Collyer on Part.*, §§ 197, 198; *Kirk v. Hodgson*, 3 *Johns. Ch.* 405; *Strelly v. Winson*, 1 *Vern.* 297; *Robinson v. Thompson*, *Ibid.* 465; *Falkland v. Cheny*, 1 *Brown's P. C.* 91; *Rooth v. Quin*, 7 *Price (Exch.)* 193.

Where it is provided in the articles of copartnership that the management of the affairs of the firm shall be controlled by the majority, or where that is necessarily implied, it would be impairing the obligation of the contract to prevent the majority from exercising that right. In the case now before the court, the distinct provision of the fundamental contract was and is, that a majority of the board of directors should have the management of the affairs of the corporations, and that the boards of directors should be elected by a majority of the stockholders.

It has been the law of the Joint Companies, repeatedly recognized by the legislature and all the stockholders, that consolidations may be made, capital increased, and the

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undertaking enlarged, upon the consent of a portion of the stockholders. These stockholders have too often admitted the right of a majority, less than the whole, to determine upon and engage in enlarged enterprises, to now insist upon unanimity being necessary.

The rules laid down in *Strelly v. Winson* are worthy of notice. True, the property there was a ship ; but why should any different rule apply where the property is a railroad ? The doctrine of that case is that the majority have the right to direct and control the use of the property. If the minority chose to embark in the venture, they had the *right* to do so ; but if they are unwilling to do so, they could not prevent the majority from engaging in the undertaking, but in that case they could *compel* the majority to pay to them the value of their shares in the vessel. This is reasonable and equitable. Upon this very same principle rests the act of March 17th, 1870. Upon the same principle are based all our statutes for the partition and sale of lands held by joint tenants, tenants in common and coparceners. Upon an analogous principle rest the numerous acts for draining, without the consent of a minority, swamp and low lands owned in severalty by many owners, but where the lands adjoin on and connect with each other. *Lauman v. Lebanon V. R. Co.*, 30 Pa. 42 ; *Coll. on Part.*, § 198 : *Law Rep.* 6, Ch. Ap. 176.

In the great mass of legislation in this state relative to private corporations, which has taken place during the last fifty years, every act which has touched the subject (with insignificant and almost a solitary exception), has authorized a majority—less than the whole of those interested in the stock—to enlarge the undertaking, to increase the capital, to engage in new works, create preferred stock, consolidate, and all things of that kind. Have all those acts, or the execution of them, impaired contracts, and have they been and are they all unconstitutional ? The question is momentous. But it is said that those acts are saved from invalidity by the acquiescence of the minority. That cannot be, because a law which is obligatory only on those who choose to con-

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form to it, is no law at all. Nor can those acts, if invalid, be validated by the acquiescence of the minority presumed from their silence or inaction, because a large portion of the minority, in many cases, consists of infants, married women, persons *non compos*, and others who are incapable of giving consent, and against whom acquiescence cannot be presumed. If those laws have no better foundation than acquiescence, they are all invalid, and the many millions of dollars invested upon the faith of them have no legal stability or security.

The solution of this difficulty to my mind is this: Our legislation has proceeded upon the assumption, that by the law of New Jersey a majority; less than all, of the stockholders of a corporation, through the directors elected by them, had the right by law to govern, as between the corporation and its stockholders, as to the application of the capital and funds and the conduct of the business, and that stock in all incorporated companies had been and would be subscribed for upon that understanding. See the reasoning of Bigelow, Chief Justice, in *Durfee v. Old Colony R. Co.*, 5 *Allen* 242, 3. This view did not prevail in *Kean v. Johnston*, because there was the *exceptional* circumstance that the legislative act authorizing the sale was upon the *condition* that "the said purchase shall be made with the consent of the last mentioned stockholders." It is noticeable that this act did not require the consent of any of the stockholders of the Somerville and Easton Railroad Company—the purchasers.

In *Zabriskie v. Hackensack and New York Railroad*, it did not appear that a majority of the stockholders had consented to the extension; indeed, the aspect of the case is that they had not consented. The question here was, therefore, not involved in that case. That circumstance, had it been otherwise, in the opinion of the Chancellor then expressed, would have made no difference. But as the point here was not necessarily involved in that case, we can not say that it was fully discussed in the argument.

As I understand *Zabriskie's* case, his right, to protect

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which relief was granted, was based upon an *implied contract* that the corporation would not thereafter, *without his consent*, extend the business authorized by its charter beyond the limits to which it was authorized when he became a stockholder.

With very great deference, I venture to question whether such a contract, in this state, can be *implied*. In view of New Jersey legislation in respect to private corporations; in view of the fact that almost every corporation authorized to construct a work of internal improvement, which has constructed its work, has, by subsequent legislation, been authorized to extend or enlarge its works, increase its capital, consolidate with or lease to some other company, and that, too, without requiring the consent of all the stockholders—for over fifty years we have seen such things done over and over again, without getting or asking for the consent of the stockholders,—and in view of the fact that that course of business has been acquiesced in almost unanimously by stockholders for over half a century; are we warranted in concluding or inferring that any intelligent man, when he subscribes for stock in such a corporation, does so upon any such understanding or expectation as is assumed in Zabriskie's case?

On the contrary, as a matter of fact, is not the stock in every such corporation taken, in the hope and upon the expectation and belief that the works and business and capital of the company will be extended as soon as the managers shall deem it expedient, and they shall receive legislative authority to do so? If there is any implied contract upon that subject, it seems to me it is this: that the corporation *will* enlarge and increase its business as much and as rapidly as possible, and that, if necessary for that purpose, the works shall be extended, the capital increased, and advantageous business alliances formed. That has been the course of all such corporations, and, in such matters, men expect *that what has been, will be*.

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The alleged rights of the complainants should be settled at law, and not on a motion for an injunction.

1st. The complainants allege that the act of March 17th, 1870, so far as it apparently authorizes the lease in question, without the consent of every stockholder, is unconstitutional.

2d. They allege that the lease in question is violative of a contract between them and the corporation.

The first of these questions is one for a court of law. The Chancellor so held in *Dunn v. The Peapack Valley Railroad Company*, and refused the injunction. *Scudder v. Trenton Del. Falls Co.*, *Saxton* 694.

The question whether there is such a contract between the complainants and the defendants as they allege, and whether the proposed lease violates it, are also legal questions, and, so far as I know, not decided by any court of law in this state.

In England, it has been very usual to leave or send such questions to be decided at law.

Clay v. Rufford, 8 *Hare* 281; *S. C.*, 19 *E. L. & Eq.* 350; *Great North. R. Co. v. Eastern Coun. R. Co.*, 9 *Hare* 306; *South Yorkshire & C. R. Co. v. Great Northern R. Co.*, 19 *E. L. & Eq.* 513; *Johnson v. The Shrewsbury & C. R. Co.*, *Ibid.* 584; *Shrews. & Birm. R. Co. v. London & Northwest. R. Co.*, 21 *E. L. & Eq.* 319; *Att'y-Gen'l v. Ely R. Co.*, *Law Rep.* 6 *Eq.* 106.

Such has been the course of this court.

Stevens v. The Paterson & Newark R. Co., 5 *C. E. Green* 126; *Babcock v. N. J. Stock Yard Co.*, *Ibid.* 296; *Att'y-Gen'l v. Steward*, *Ibid.* 415; *Higbee v. C. & A. R. Co.*, *Ibid.* 435; *Inhabitants of Winslow v. Hudson*, 6 *C. E. Green* 172; *Hack. Imp. Com. v. N. J. Midland R. Co.*, *ante p.* 94.

To conclude: The complainants have suffered no injury, nor is any right of theirs, legal or equitable, threatened or exposed to any injury.

The proposed lease is within the power of the defendants to make, and of the lessee to take. It is also advantageous,

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and will be beneficial to the complainants and all other stockholders, and, therefore, the bill should be dismissed.

Mr. C. Parker, on same side.

The controversy is between stockholders, to the amount of \$345,000, and others, to that of at least \$12,660,000, in relation to policy and their joint interest. The large majority resolve to lease their works. The minority dispute their right. It is a question, merely pecuniary. All that has been said in respect to public policy, is foreign to the dispute.

The answer shows the reasons for the opinion of the majority. Large expenditure is necessary to meet business, which contracts already made has induced, and there is no money. Debt and expense has gradually increased, without proportional earnings. \$695,495 was borrowed to pay the dividends of 1869, \$1,334,505 to discharge that of 1870. Stockholders accustomed for long years to ten per cent., are unwilling to reject an opportunity of perpetuating it. Millions are necessary, if accumulating business is to be met, and they are not attainable. The business must be met. It is the result of the great trans-continental roads now making New Jersey their gateway to the ocean. If it be not accommodated, there will be rivalry and consequent loss. The situation of the companies may be the result of want of management; it was more that of the want of prophetic vision. But whatever its cause, it is now unavoidable, and this lease the directors and stockholders deem a necessity.

All this is pertinent, for it shows there is no fraud, no heedlessness, and no gross mismanagement in the bargain for the lease.

A word as to certain foreign topics. Whether the act of 1870, and the lease it authorizes, releases the reserved right of the state to take those works at cost in 1888, has nothing to do with the cause. But if it had, the statute and general law settle the point in the negative. The act provides that "no such consolidation, lease, or other arrangement shall

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have the effect, * * to release or discharge the companies, or any company, with which any such * * lease may be made from any taxes, *liability*, obligation, or duties which they, or either of them may be subject or liable to, either to *this state* or any other person." Is not this reserved right a "liability?" Is not that the word to describe the position of the companies in relation to that right?

And by general law, the lease can only transfer what the party has. If it be mortgaged, or subject to any right, it passes thus, not otherwise. The state assents to nothing more.

The terms of the lease retain security for performance of its covenants, and all new acquisitions of property by the lessee are made to become such. The corporations remain to enforce the rights of their stockholders. The lease is consolidation, but in a way better for their protection than any other. But the policy of the bargain is not for the court to criticise, further than to be sure there is neither fraud, nor such want of diligence as to be equivalent.

We pass then to the case. There are three questions, and but three.

1. Had the United Companies authority to make this lease?

2. Had the Pennsylvania Railroad Company a right to accept it?

3. Was the act of the legislature constitutional?

I shall proceed to consider these points in their order. On the first, the authority of the United Companies to make this lease, it is necessary, first of all, to observe the relative situation, geographically and physically, of these two companies.

There subsisted between them the agreement of February, 1863, which is appended to the answer. It is between the same parties as those named in this agreement of lease; providing for a connection between them, and for the carry-

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ing on of through traffic. By it, the Pennsylvania Railroad agree to build the connecting railway, and to lease it to the Trenton Railroad for nine hundred and ninety-nine years. The Philadelphia and Trenton Railroad agree to pay six per cent. for its use and maintenance; the Pennsylvania Railroad agree to allow tracks to be run so as to reach the Wilmington Road and the Pennsylvania Road, "so as to form a continuous line," says the agreement, "over the said road;" and they also agree to give a nine hundred and ninety-nine year lease for that. The Pennsylvania Railroad Company also agree to give the United Companies, for nine hundred and ninety-nine years, two tracks, &c., to the new passenger depot in West Philadelphia, so as to accommodate passengers to New York. The freight and passengers were to be carried over the United Companies' works. The rest of the agreement regulates this traffic, carefully, and settles the division of receipts. The agreement itself was to subsist for nine hundred and ninety-nine years.

Now, this agreement was not, perhaps, in all respects, public, but the connection was, and it lay open to the eye of the legislature. That connection was three-fold. There was the Delaware and Raritan Canal, which brought goods to the Pennsylvania Railroad at Philadelphia, and so was a "connecting and continuous line." There was the Camden and Amboy Railroad, which, by decisions of the courts of our state, ends at Philadelphia, and which there connects with the Pennsylvania Railroad Company's line. And there was the Camden and Amboy, and New Jersey Railroad Company, connected by rails with the Pennsylvania Railroad Company, so as to run cars from New York to New Brunswick by the Trenton branch and the "spur" to the Delaware bridge; thence on the railroad across it; thence on the Philadelphia and Trenton Railroad to the "Connecting Railway," and by that road to the "Pennsylvania Railway."

This spur is authorized by an act of our legislature of

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March 5th, 1837. The Joint Companies own the Philadelphia Trenton bridge, by contract of the bridge managers in 1835, and paid the expense of laying the rails on the bridge. On the 7th of December, 1850, an agreement was made about that, which is set forth in the answer. In 1870 all the stock of the Bridge Company, except one share, belonged to or was the property of the United Companies. All this is set forth in the answer, and shows an amalgamation, practically, of the Philadelphia and Trenton Railroad Company with the New Jersey United Companies.

With this state of things existing, and this structural business connection apparent, the legislature of New Jersey passed the act of 1870, which is set forth as part of the bill. In considering that act, the first point to be noticed is, what sort of a lease it was which was projected by the act? It is an act "to enable the United Railroad and Canal Companies to consolidate their stock, and to consolidate or connect with other companies." The power given by the first section of the act, is to consolidate with "any other railroad or canal company or companies in this state or otherwise, with which they are or may be identified in interest, or whose works shall form with their own continuous or connected lines." Another phrase is used that touches this question of the lease. They are authorized expressly to "consolidate their respective capital stocks, or to consolidate with any other railroad or canal company." Then, what they were authorized to do was to make an arrangement in perpetuity. That is exactly the idea of consolidation. "Consolidation" is a railroad word. Companies only consolidate when they become one in the sense of absorbing the one in the other. The Elizabeth and Somerville Railroad consolidated with the Somerville and Easton, and thenceforward became the Central Railroad of New Jersey and departed from sight. It means a permanent transfer of the company; a transfer which shall be irrevocable; which shall absolutely destroy the existence of the stockholders in any of the corporations consolidated. It is in that sense that the legislature of New

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Jersey themselves have used that word, and that too, it will be seen, at a very early day.

In the laws of New Jersey of 1867, p. 114, it is recited: "Whereas, it is desirable that the railroad lines between New York and Philadelphia, forming by their connection essentially one line, should be more closely united in interest and management, whereby great advantages would accrue to the public, as well as to the stockholders." * * * * * The very act itself recites that these are railroad lines *between New York and Philadelphia*. "And whereas, the Delaware and Raritan Canal Company, and Camden and Amboy Railroad Company, known as the Joint Companies, owners of one portion of said lines, and the New Jersey Railroad and Transportation Company, owners of another portion thereof, have made, or are about making, an agreement for a *consolidation* of interests, and an equality of dividends, be it enacted, &c., that said companies be and they are hereby authorized to make such agreement for consolidation of interests, as they may deem proper and expedient, &c."

And then, in the second section, it goes on: "When such agreement for consolidation is or shall be made, the said companies entering, or having entered into the same, shall be consolidated and united in interest, according to the terms of such agreement, and shall be authorized to transact their business as a joint concern." And a little further below: "The said consolidated interest shall thenceforward be called and known by such corporate name as they shall adopt for the said consolidated or united interest."

But the word appears still earlier in legislative use. The "Marriage Act," as it is generally called (*Laws of 1831, p. 124,*) uses it. It says: "It shall and may be lawful for the Delaware and Raritan Canal Company, and the Camden and Amboy Railroad and Transportation Company, by and with the consent of seven-eighths of the stockholders of said companies respectively, *to consolidate* the capital stock of

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the said companies, for the purpose of erecting and completing the canal and feeder of the said railroad."

Here we have an early legislative use of these words. We know what was produced by the consolidation of these two companies: that they became from that moment one, and were known as "The Joint Companies of New Jersey," and their stockholders always shared dividends equally. Now, that was exactly what is designed to be accomplished by this act. It is no matter whether it was to be effected by a contract, agreement, lease, or other arrangement; all the while some sort of consolidation is intended.

A consolidation means perpetuity, when the two consolidated companies are in their nature perpetual. Therefore, it seems very clear that any lease, for however great a term of years, is not beyond the purview of this act. Suppose consolidation had been carried out by some other means, the debts of the consolidated concern would all have been charges upon the stockholders of each. There would have been this difference between a consolidation carried out by the lease, and a consolidation carried out otherwise, that whereas now all the works that belong to these stockholders of the United Companies remain security to them for the performance of the covenants that are made, for the payment of their ten per cent., and for all other covenants in the contract of lease, in the other case of consolidation that property would have passed away from them into the hands of some other company forever, and been subject not only to their own debts, but to the debts of that company; so that what this lease has effected, is less than what the act contemplated as possible to be effected, and the arrangement is far more secure for the stockholders.

A perpetual lease is then within the purview of the act. Could it be lawfully made to the Pennsylvania Railroad Company?

With what class of corporations did the act of the legislature empower connection to be made? 1st. Any, with which they (the United Companies) are or may be "identified in

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interest." 2d. Any, "whose works shall form with their own, continuous or connected lines."

What does the legislature mean by the phrase "*identified in interest*?" It illustrates its meaning in the preamble of the act, for it there recites not only that the three United Companies are "identified in interest," but that they have also an "identity of interest" with the Philadelphia and Trenton Railroad Company, and with other companies. When it is objected then that the legislature could not have meant companies of other states as among those with whom connection can be made, it is evident the suggestion is futile; for here is a corporation existing only by the laws of Pennsylvania, which is described by the legislature itself as having an "identity of interest."

But study the situation of this Philadelphia and Trenton Railroad, and the character of its relation to the United Companies; for the act expressly states that it has "an identity of interest" with them. It is one of their feeders, and it has a contract with them by which they divide the profits of business. The act contemplates two modes by which companies may be "identified in interest." One is an actually subsisting, legalized contract between them, by which the interests of the stockholders are all made the same; the other is by local relation, by which one becomes feeder to the other. And the context shows this latter meaning to have been intended. The phrase is used again, and is there followed by the important phrase "or whose works *shall* form, with their own, continuous or connected lines." This is mentioned as one mode of being "identified in interest." The language is in the disjunctive, and specifies another class of companies identified in interest than some who are yet so identified; for the routes of no company can possibly form a continuous line, or a connected line with those of another, without the two being "identified in interest," because, in such case, the travel of the one must flow into the other. And again: the preamble states that the United Companies have an "identity of interest," not only

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with the Philadelphia and Trenton Railroad Company, but with "*other* companies." How, except by means of local relation?

It is to be noticed that this description of this means of "identity in interest," to wit, by having the "works" of companies form "continuous or connected lines," is in the future tense; the language is, "whose works *shall* form" with their own "continuous or connected lines." Whenever any company shall so arrange its works, it becomes *a* company with which the consolidation, authorized by the act, can be made. If, then, any railroad acquires or possesses a line which connects with the Jersey lines, no matter how, whether by erection under their charter, or legal purchase, its "works" form, with those of the Jersey companies, a "continuous" or "connected" line, and that company may lawfully be a party to this consolidation. And even if it be thought that the having a continuous or connected line does not make the "identity of interest" contemplated by that phrase in the statute, still any company, who at any time may acquire "works," forming, with those of the defendants, a continuous or connected line, may then, by virtue of that description of the class of companies who may form the consolidation, take this lease.

But not only is it true that the act contemplates a foreign company as one with which a lease is or may be lawful, but it is further true that there is no company of this state so situate as that this phrase "*continuous*" applies to it. This word is not used as synonymous with "connected." It is a class of connections—one by which the "line" continues on—and the phrase of the statute is that they may connect with those "whose works shall form with their own continuous or connected lines." Spurs connect, but the "line" is not thereby continued. Force, in this connection, is due not only to the words "continuous" and "connected," but to the word "line." It is important; and if you find a railroad whose works form "a continuous line" with those of the United Companies, *a line of business* that continues on, you

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have found a company with which this consolidation may take place.

Now, where is the company, organized under New Jersey laws, which forms "a continuous line" with the United Companies' works? The map presents none; and all companies owning their "connected" lines are subordinate companies—not likely to be expected to be lessees of these great works; while on the other hand, the Pennsylvania Railroad Company is, in the first place, "identified in interest," for it feeds and is fed by the travel of the United Companies; and again, it is connected with these companies by an agreement in perpetuity, by which travel is to be forever continuously carried over their respective roads. There is, therefore, clearly the "identity of interest" that is required.

But there is meaning in the phrase "connected *line*." It signifies *business connection* as well as structural. The peculiarity of such a connection is illustrated by the case of *The Philadelphia and Erie R. Co. v. The Catawissa R. Co.*, reported in 15 *Am. Law Reg.* 231. The exact point of that case was to define what were connecting railroads. There it was held that connecting railroads are either those which have such a union of tracks as will admit the passage of cars from one to the other, or those which have an intersection such as will admit the convenient interchange of freight and passengers at the point of intersection. Therefore, if we show in this cause a line of travel having an intersection such as will admit of a convenient interchange of freight and passengers at the point of intersection, plainly there exists this "connected line" called for by the statute. See also *Albany Law Journal* of Sept. 16, 1871, p. 119, pl. 5.

To recapitulate: Several considerations justify and corroborate the idea that the legislature intended a consolidation of business with a foreign company: 1. The act mentions a foreign company when using the phrase "identity of interest." 2. It could not have contemplated any of the *minor* Jersey companies as likely to lease these great works. 3. It had evidently in view, when speaking of "*identity of*

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interest," a feeding line. 4. No company whose works form with theirs a "continuous" line, exists in New Jersey. 5. The Pennsylvania Railroad Company has both "identity of interest" with the United Companies by contracts already existing, and also carries on a "continued line," which is operated *continuously*. 6. In every railroad in New Jersey connected with them, the United Companies hold stock—generally a majority of the stock—by express authority of the legislature. What need was there for an act which should empower consolidation with these?

A list of all the acts since 1849, supplementary to the Joint Companies, shows acts authorizing stock subscriptions to the Freehold and Jamesburg, the Belvidere Delaware, the Flemington Railroad, the Rocky Hill, the Mount Holly and Pemberton, the New Egypt and Hightstown, and the West Jersey Railroad. Some of them authorize the endorsing of bonds of the Princeton branch and other railroad companies which are now connected with the United Companies. The legislature gave the United Companies express authority to purchase the stock of these companies. If, then, they had authority to purchase the stock of these companies, what need was there for any authority to consolidate with them? And these are the companies with whom connection in this state is made. Could they, then, have been meant as companies having "an indentivity of interest," or "whose works form connected or continuous lines," with whom alone this consolidation might be effected?

And so, unless the Pennsylvania Railroad Company could consolidate with the United Companies, who could? There is not a single company of all those with which they connect, in whose stock the United Companies have not at this moment a controlling interest. It is manifest, therefore, that such companies could not have been those which were referred to by the legislature. Then where is the company, except it be the Pennsylvania Railroad Company, whose works form, with the works of the United Companies, a "continuous" or "connected" line?

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Now, the view taken thus far leaves out of sight the words "or otherwise," upon which so much comment has been made; but these words evidently look to the same result.

Most evidently, by the act, three modes of actual consolidation are spoken of and intended as possible or permissible. One is "consolidation of stock;" another is "consolidation of business;" the third, the "connection" by lease of lines, or, if you use that term, "consolidation" of other *lines*. Now, what does the act mean? Does it mean all of these modes—or if not all, which of them? We insist it means all or any of them. Now, if it means "consolidate in this state or otherwise," having *structural* consolidation in view, then it must mean by a union of lines out of the state; for there can be no "continuous" line from New York to Philadelphia made by union with any companies in this state. If it means that the companies must be "in this state or otherwise," (which we think it must mean,) then what can "otherwise" signify, except companies not in this state? The rule of construction is to give effect, if you can, to every word, and it is not permissible to take a word out of one sentence and put in another; you must read the language of the statute as it stands. A reasonable paraphrase would be, "existing *in* this state," or "otherwise *than* in this state;" *i. e.*, existing somewhere else. But "companies *in* this state" is synonymous with companies "*of*" this state. Does not the preposition "in" there have just the meaning of the preposition "of," and nothing more? The phrase "companies in this state," has reference to the locality of creation; the place from which the company hails. Substitute the word "of" for "in," and does not all possible difficulty vanish? Then it would read, "to consolidate with any companies of this state or otherwise;" that is, "*otherwise than of this state.*" You cannot understand the word "otherwise" in any sentence, without filling out the sentence by repeating the words preceding, with the conjunction "than." Thus: "sick or otherwise;" otherwise *than* sick. "Well or otherwise;" otherwise *than* well. To give the

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word "otherwise" any meaning at all, it is necessary that it be immediately succeeded by the word "than." Just follow, then, this rule in reading the statute—substitute "of" for "in"—and when you speak of companies of this state or otherwise than of this state, why they are companies that are of another state; that is all.

But again, this same preposition "in," just in that place, means "under the laws of," because a company cannot exist in this state, except it exists under the laws of this state. Use that phrase, then, in substitution; make the sentence read, "companies existing under the laws of this state or otherwise," and the meaning is obvious and clear. What intelligent meaning, therefore, can be given to these words, "or otherwise," excepting that they refer to the place where the corporation has its local habitation and whence it derives its name?

The method of explaining these words on the other side is extraordinary. They say, that you should drop the words "or otherwise" out of their place, then pick them up and put them back in the sentence in this connection: "or to consolidate *or otherwise*, with any other railroad or canal company or companies in this state with which they may be identified in interest." "Otherwise"—what? "Arrange," Mr. Browning has in his brief. But that is putting in an entirely new idea; that is coining another word; and yet he must do it, because by his arrangement he almost turns an adverb into a verb, and makes it have the force and effect of some other word than itself.

As to the second general point: Has the Pennsylvania Railroad Company the right to accept this lease? Remark, in the first place, that if the act authorized these companies to make a lease to a foreign company, it would seem to have authorized the reception by that foreign company of that lease; and that here, in this state, and before our tribunals, the question of power on the part of the company thus authorized to receive cannot be mooted. Suppose this Pennsylvania company accepts this lease, and suppose, also, it

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had no power so to do, could it come into our court and deny that it had power to receive it? It might do that in Pennsylvania courts. But it seems to be a very different question as to whether it would be permitted to do it here;—after receiving all the property and making use of it, then to turn round and say, “we never had any power to receive this title, and therefore we will not abide by the liability which it imposes.”

But the acts of Pennsylvania are full upon the subject. One act provides: “That it shall be lawful for any railroad company existing under the laws of this commonwealth, from time to time, to lease or become the lessees, by assignment or otherwise, of any railroad or railroads, or enter into any other contract with any railroad company or companies, individuals or corporations, whether the road embraced in such contract or lease be within the limit of this state, or created by or existing under the laws of any other state or states.” This act empowers them not only to accept a loan and become a lessee, but it empowers them to enter into any other contract with any such company as is there referred to.

It is asked, what right has this Pennsylvania Railroad Company to take a lease of the goods and chattels, the moneys and effects, the ten thousand choses in action, which pass by virtue of the lease? They had express authority to enter into any contract other than the lease. And if they had that power to enter into any contract, though these articles are not the ordinary subjects of lease, nevertheless they have full authority to take title to any of them. And as to stock, in the acts of Pennsylvania for 1869, p. 11, is an act that bears directly on this subject. It is in these words: “It shall and may be lawful for any railroad company created by, or existing under the laws of this commonwealth, from time to time, to purchase and hold the *stock* and bonds, or either, or to agree to purchase or guarantee the payment of the principal or interest, or either, of the bonds of any other railroad company or companies chartered by, or existing under the laws of any other state.”

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What if consolidation had occurred otherwise than by a lease—what if, instead of this “mode of connection” in business, the mode had been adopted of absolutely consolidating with the Pennsylvania Railroad Company—what then would have become of the property, the choses in action, the stock, the rolling-stock, everything that belongs to the United Companies? They would at once pass over. And thus by means of this lease, comprehending in its terms an agreement for perpetual substitution, the stockholders of the United Companies retain their property in effect, while they simply part with it in form.

Passing to the third general head of discussion: *Was the act of the legislature constitutional?*

It is alleged that it was unconstitutional because it required the consent of only two-thirds of the stockholders; or, to put the objection in other words, it is alleged to be unconstitutional as against the dissentient stockholders. The inquiry is, is it such a change in the organic law or structure of the company as that it cannot be binding upon all stockholders, though a majority of them may adopt or wish it. It does not seem to be the intention of the legislature to authorize a hardship upon the stockholders, rather the reverse. If they had required no “consent,” the act could have been accepted by but a majority of the stockholders, directly or indirectly. But they demand the consent of more than a majority—of two-thirds. Indeed, it would seem that their object was to test the wisdom and propriety of the measure. The act is no better, no more legal, in requiring two-thirds, than it would be if, expressly or impliedly, the consent of a majority of stockholders had been required.

Now, on this point we have nothing to do with consolidation; that is, consolidation of stocks or absorption of the company. The lease does not do this. And though it *may* be true that “a consolidation” would be an infringement of the rights of dissentient stockholders (that consolidation being in stock and in the ordinary form), it is by no means, there-

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is true that a lease is an invasion of the rights of dissentient stockholders; because "a consolidation" does pass away all property forever, and put a man's interest into another concern, making him embark in a different enterprise. There is not here, as said before, *consolidation*, but only *connection of business*; and the argument is to proceed upon just what has been done, and not upon what might have been done under this act.

The simple question is this: Does the exercise of the power to lease, work such a change in the structure of the company as that an unwilling stockholder may say "*non facit in fœdera veni*." Two things appear to be clear: *first*, that the lease is no such change; and *second*, that if it be such a change, the act is still constitutional, because it provides for compensation to dissentient stockholders.

What, then, is the intrinsic nature of a lease? It is a delegation of the active powers of the managers of the company, to another corporation, in consideration of the guarantee of profits. It is, strictly and only, the provision of a new mode for the profitable use of the franchises. Though such a delegation is not lawful, without express authority of the legislature, yet when that authority is given, a majority of stockholders may accept it, and may make it binding upon all. We do not dispute the authority or soundness of the ruling in *Zabriskie v. The Hackensack Railroad*, or of the case which preceded it. Both were cases in which the legislature authorized the investment of the money of an individual in an enterprise entirely different from that in which the money had already been invested. In *Kean v. Johnston*, the legislature authorized the consolidation of the Elizabethtown and Somerville Road with the Elizabethtown and Easton Road, and the creation therefrom of the Central Railroad of New Jersey, and permitted the new company to give its shares to every stockholder in the old in lieu of the shares that he theretofore held; and the money of the Elizabethtown and Somerville stockholder was thenceforward to be used not in the road for which he subscribed it (between

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Elizabethtown and Somerville,) but in a road for which he never did subscribe it, between Somerville and Easton. In the other case—of the Hackensack Railroad—a branch was authorized, and the question was whether the stockholder's money, that was specially given for a certain road, could be used in another road. Those cases were both very different from this; because a new mode of using the very franchise, which was the subject of the investment authorized by public authority, is an entirely different matter from a law authorizing the use of the money, the subscription, the stock which was held, in an entirely different enterprise. A party may say to the legislature, "we embarked in one special enterprise; who ever dreamed that by so doing we should be dragged into another?" But a new mode of use; a selection of a different set of men for the discharge of the duties embraced in the running of a railroad; the giving power to perform a work which must be done by a different set of agents—this is a thing by no means parallel with the adoption of a different project. Suppose a supplementary law authorized a controlling executive committee to be constituted, to whom all powers were to be committed; suppose a law authorized a greater freedom in the mode of use, such as a greater width of track, or a change of route between the same termini, or an adoption of two routes between the same termini; or the adoption by a horse railroad of locomotive power; or, in these days of novelty, the adoption of stationary power like that used on the elevated railway in New York, or of magnetic power, if that be possible; or again, the building of the railroad on an elevation; or, if this were the original plan, then a change, and the authority to build it upon the land; or again, in the case of a trust company, the reception of goods on deposit; or if the company were a savings bank, the right of discount or of issue; or if a railroad company, that of connection simply, or even of a lease of a connecting railroad, or a bargain for the admission of a new railroad project to trade in just partnership; in all these cases, and as many more as may be conceived, a different

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contract is made, and yet the structure of the contract remains. Cannot the state give this additional power? and does not every subscriber to stock agree, impliedly, that if the public authority demands or empowers any new way of discharging a public duty, his associates may agree to adopt it? That is the point that seems to meet us here.

The able decision of Chief Justice Gibson, 2 *Watts & Serg.* 161, states the distinction upon this subject.

In this case, it was insisted that there were two alterations in the original contract. One was that the legislature gave the larger stockholders more votes than they had at first; and the other (this to which the Judge refers) was that the legislature authorized them to raise the dam, thereby subjecting the stockholders to a greater amount of expenditure for damages. The argument was thus stated: "By the act no stockholder shall be entitled to more than ten votes, and by the eighth section the dams to be erected were limited to four feet six; whereas by the new act, the stockholder is in a measure silenced." The opinion of the Chief Justice decides that such new privileges and changes in the organization, and mode of use of the franchises, are not invasions of the structure of the contract, but they are such things as belong to the legislature, and which the legislature has the right to give to public corporations, and which every stockholder in such a corporation, when he makes his original contract, contemplates may yet be conferred by the legislature upon him.

This case has been followed in many others. Your Honor will find an illustration of the same principles strongly set forth in *White v. The Syracuse and Utica Railroad*, 14 *Barb.* 560, and in *The Troy and Rutland R. Co. v. Kerr*, 17 *Barb.* 601. The opinion there runs somewhat counter to the conclusion at which the court arrived, but it is valuable because it refers to the whole subject with a good deal of succinctness; and the court will find a number of cases cited there which are of use in the investigation of this subject. It cites two English cases, *Stevens v. The South Devon R.*

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Co., 13 *Beav.* 48, and *Ffooks v. The London and South Western Railroad*, 19 *E. L. & Eq.* 11. I may add in referring to these decisions, without citing them, that your Honor will find this class of ruling; that the courts will restrain managers of a corporation, at the instance of stockholders, not from applying to Parliament to get new powers, but from spending the money already subscribed for that purpose. The courts seem to leave the stockholder in this position. They say to him: if the company gets new power, we won't help you as against their exertion; you must help yourself, because evidently the legislature have the right to confer these new privileges, and it being a public matter their right is not to be abridged. And then the remedy of the stockholder is simply this: if he chooses to sell out, he gets his money back; if he chooses to go on, he acquiesces in the privilege and in the new sort of enterprise, or whatever the legislature orders.

This view of the law, as established in Great Britain, is exactly in accordance, practically, with what we contend for here; namely, that whenever a corporation having political objects is organized, there lies reserved in the legislature, by the contract of every stockholder, the authority to confer upon that corporation new privileges as to the mode of exercising its franchise, and that if the legislature does grant these new privileges, then it may be accepted by a majority of the stockholders, and is thereby made binding upon all. A corroborative suggestion on this point is this: ordinary, that is to say natural, persons can build a railroad if they do not need the power of "eminent domain;" and if they thus build one across the state, they would have the power of lease as incident to the right of property. Corporations, for wise purposes, are not invested with all the powers individuals have. The directors are made trustees for the exercise of the "public use," and they are public officers. Is there not an implied contract by those who join such a corporation, that any of the ordinary rights, as to disposition of property,

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if the legislature chooses to confer them, may be acceded to by the corporation?

Now, this implication—the implied contract on behalf of every stockholder, that there were certain powers reserved by the legislature, and which it might yet confer, and which might lawfully be accepted by the corporation—this implication seems strengthened very much by a reference to the original acts chartering these two great companies; acts passed at the same session of the legislature, by which the Camden and Amboy and the Delaware and Raritan Companies were both incorporated. It is enacted that the corporations constituted, shall have, enjoy, and exercise all the rights, powers and privileges pertaining to corporate bodies; a very large power.

“All the powers pertaining to corporate bodies and necessary to perfect an expeditious and complete line of communication from Philadelphia to New York, and to carry the objects of this act into effect”—that was what the legislature proposed to give these corporations, each of them. That was the declaration of what their intent was; that is a description of what the stockholders accepted; that is a definition of what the stockholders understood as possible to be done in the future. It may, in one sense, be called a promise solemnly made on the part of the legislature, that if they did not then have all powers that were necessary “to perfect a complete line of communication from Philadelphia to New York, and to carry the objects of that act into effect,” they might expect that the legislature would, one day, grant them. Now, why these very strong expressions, “*perfect a line of communication*”—give it everything that in the future, as well as in the present, could be dreamed of—“*perfect a complete line of communication?*” Complete—how? Everybody knew what the line of communication was, and was to be, a line of rails stretched from one city to another. Why use the word “complete?” Was there not some mind even then existing, some genius almost prophetic, which could peer into the future which was then unseen and almost unim-

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aginable, and foretell that to-day there is necessary to fill out the word "complete," a much larger amount of power and a grander scope than then was dreamed of. The object of that act, in the minds of the wise and skillful men who devised it, had reference to what was, to their minds, plainly apparent, though others might not then have recognized the peculiar situation and locality of New Jersey. They saw that she lay in the pathway of all the industry and productive power of this whole continent, to its great commercial emporium. They saw that the time would come when the word "complete" would indeed be a large word and signify much. And in taking a contract from the state with a view to its great future, they took in words which clearly show that their intent, as stockholders, was to have every power of use of their franchise that could possibly be given for its promotion.

And, again, this implication is greatly strengthened by a reference to the course of legislative practice, which is the practice likewise of these very stockholders in relation to these acts. In 1831 was the first consolidation between these two companies; and a system or practice as to new powers, the mode of conferring and acquiring them, was at once then begun. Consolidation was effected between the canal and the railroad company. That consolidation could take place only on the consent of seven-eighths of the stockholders, and it was provided that disagreeing stockholders should be paid back what they had paid, with interest. In March, 1832, an act was passed by which authority was given to transfer a thousand shares of the stock to the state, by which it was provided that a new system of government should be created. A director was to be appointed by the state, and the authority of that director was particularly defined. A lateral railroad to New Brunswick was also authorized. Provision was thus made for changing the mode of government of this corporation, for giving away a large portion of its capital, and establishing a new mode of employment of its capital by a road to New Brunswick. All this

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was provided to be done by the assent of a majority of the stockholders. A few days after, in 1832, a change of location was allowed. In 1835, a lateral road was authorized, without any consent being required. In 1837, connection with the New Jersey Railroad was permitted, without any stockholder's assent being required. And after that, running down from 1850 to the present time, no less than twenty-two acts authorizing subscriptions from the moneys of this corporation, for the Freehold and Jamesburg Railroad, the Belvidere Delaware Railroad, the Flemington, again for the Freehold and Jamesburg, the Rocky Hill, the Mount Holly and Pemberton, the New Egypt and Hightstown, the Flemington again, the West Jersey Railroad (permitting the endorsing of bonds of other companies), and so on—twenty-two acts of that nature will be found, entirely altering the very structure of the original contract, with no provisions for the assent of stockholders, nor for compensation to them. And this review brings us down to the act creating the United Companies, which act is the second in the list in which dissentient stockholders are provided for ; and in that act the same kind of provision is made for their compensation as in the act which is now in question before this court.

It is one of the strong points of the stockholders who filed this bill, that they are either original or old stockholders. They state to the court as one of the reasons why their complaint should be listened to, that they invested their money long ago ; that they have kept it there through all the changes and the chances of this mortal life that have intervened ; and, therefore, they would urge the court to consider their rights with more gravity than if they were persons who had bought the opportunity of being injured. But all this while they have seen this practice of the legislature in relation to their own companies going on ; all this while they have themselves acceded to these changes in the original contract. Can they come here at this late day and say, "ail this is contrary to our contract?" Have they not established that, whatever may be the truth as to other corpora-

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tions—particularly as to other public corporations—as to these corporations, the contract shall be held one whose structure is not invaded by any such law as that in question before this court? Have they not incorporated into their original contract this provision, that the legislature of New Jersey, whenever in its wisdom it may choose, may change their fundamental law, at least in such a manner as that new modes of use of their franchises, new methods of profit for themselves, may be devised and exercised?

But, without resorting to any implication in the original contract that greater power to exert the franchise may be granted and may be accepted by the corporation, remark that the legislature *has* given this power, and that being so, that there is nothing in the original contract which prevents the exercise of it, and nothing in this case of fraud or of folly which calls upon this court to interfere. The contract is two-fold: with the state and with each other. Only with that “with each other” are we here concerned. That contract is to use, not to abandon—for mutual pecuniary profit out of the earnings, at the reasonable discretion of a board of directors constituted as by the charter; not to be interfered with, except in case of fraud, or wanton mistake amounting thereto. This is all that can be reasonably claimed, and this definition accords almost precisely with that of the Attorney-General, in his brief given to the court. Now, suppose a partnership between individuals, in an enterprise which could be carried on by individual acts, where the contract restricted action to some selected by the rest, and the others were barred by it from any active agency. Suppose the matter related to a hotel, a farm, or a ship. Suppose the managers had carefully experimented, and, without fraud and in the exercise of a reasonable discretion, determined that it was better to lease than to otherwise manage, and should propose by leasing to secure a certain profit, what would be the course of a court of equity? Would it enjoin this mode of lease? Take a mine, for instance, and suppose the contract to be as described; a certain board are

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to manage, and exclusively manage; the other partners in the enterprise give it all up to them. Now, suppose that board, instead of themselves employing miners, buying steam engines for drainage if needed, and making all the other arrangements that are necessary for a mine—suppose they choose to say to some man more expert in mining than themselves, “here, take this mine; we give it to you on a lease during all the time for which we ourselves are entitled to use it; agree that you shall work it; fix it so that you shall not abstain from working it, and pay us a royalty of so much for every ton you raise.” Would there be any objection to this in the original contract of these parties, the whole end and object of which contract was the using of that mine—the deriving profit from it? Would there be anything in that case which would call for the interposition of a court of equity? What difference is it whether it be a mine or a railroad—what difference to the individual? There is a great difference to the state. The state needs the railroad for public purposes, and there may be a desire on the part of persons who are actuated by patriotic motives, as well as by considerations of pecuniary gain, that it shall be managed in a particular way; but as a matter of right between the parties, and of pecuniary right between individuals, would a court of equity interfere? One way of using either a mine or a railroad is authorized. Actual hand-work on the part of the men who are designated to manage the work is not contemplated; some class of agents must be appointed. Another method of using the property is to farm it out for a share of the profits—to fix what is called a rent, either by royalty or by calculating the profits of every year, and thus fixing a yearly sum. Fraud or egregious folly would be restrained, and always is; but would discretion, exercised by careful men, having their own interest in view, be interfered with by the court? See, on this point, *Featherstonhaugh v. The Lee Moor Porcelain Clay Co.*, 1 *Eq. Cas. Law Rep.* 318. A company was incorporated, in the first place, for “the making, preparation, and sale of porcelain clay,” with

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power, if it should be deemed expedient, after the original business had become developed, to *combine* "mining operations" with the original business. By the company's deed it was provided that it should be competent for any extraordinary general meeting, by a majority of two-thirds in number of the shareholders, to empower and require the directors to bind the company, and every shareholder thereof, to any act, deed, matter or thing whatsoever which the company, by virtue of its corporate capacity, or otherwise, or all the shareholders together, would be enabled to make, do or execute, if the consent of every shareholder was given thereto. It also provided that the directors should have power to make contracts; and in case it should be doubtful whether it was in the competence of the directors to conclude any contract, the same might be submitted to an extraordinary general meeting, and, if sanctioned, should be binding upon every shareholder, whether under incapacity or not, in like manner as if every shareholder were *sui generis*, and had consented. The company obtained lease of land for ninety-nine years, commenced business in 1852, and paid one dividend and no other, the undertaking not turning out successful. *Held*—that after this a majority of two-thirds of the shareholders, in general meeting, were empowered under the above clause to authorize the directors to make a valid mining lease for twenty-one years of the whole of the works and buildings of the company. But it seems the clauses would not authorize the like majority to engage the company in an undertaking wholly unconnected with their original purpose.

Now the court will observe the doctrine of that case. It holds the doctrine of *Natusch v. Irving*, and of all the cases which formed the substrata of *Zabriskie v. The Hackensack Railroad*; but it says, although the contract provided for the absolute exercise of certain active power by the directors, and provided for nothing more, yet that under such power they might, where the case did not involve fraud, lease the property to somebody else, and let that somebody else do all

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the work. The case is, in every respect, precisely parallel with that which is now before the court.

Simpson v. Westminster Pal. Hotel Co., 8 H. L. Cas. 712. "The funds of a joint stock company, established for the purposes of one undertaking, cannot be applied to another, and the attempt so to apply them, though sanctioned by all the directors and by a large majority of the shareholders, is illegal. But where a company was established 'for the erection, furnishing, and maintenance of an hotel, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects,' "—this is the language of the joint stock agreement: "and the directors, while the hotel was in course of being built, agreed to let out for a stipulated period of short duration, a large portion of it to the head of a government department for the business of his office, and evidence was given that such a letting was calculated to be productive of advantage to the company in its intended business, and that a majority of shareholders had sanctioned the act; it was held that the arrangement was valid, within the words of the clause 'all such things as are incidental or otherwise conducive to the attainment of the objects for which the company was established.' "

The Lord Chancellor says: "I think that this case is to be determined on the principles laid down by Mr. Gifford, in his very able argument for the appellant; and I bow to the authority of *Natusch v. Irving*, and the other decisions to which he referred. The funds of a joint stock company, established for one undertaking, cannot be applied to another. If an attempt to do so is made, this act is *ultra vires*, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction. A railway company cannot apply its funds to make a line of railway different from that described in the act by which the company was constituted. A company established for granting fire and life insurances cannot

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engage in marine insurances. A company established to make a railway and exercise the trade of carriers upon the line, from one town in England to another, cannot add to it the trade of a steam packet company. And no company can ever abandon the business for which it was established and undertake another. Nevertheless, I cannot say that Vice-Chancellor Page Wood and Lord Justice Knight Bruce were wrong in holding that this agreement between the Westminster Hotel Company and the Secretary of State for India is not *ultra vires*. I think that, under this agreement, the directors do not abandon the undertaking for which the company was established, and they cannot be said to engage in any new undertaking."

And then he remarks upon the meaning of those words, "the doing of all such things as are incidental or conducive to the attainment of the above objects," and holds that, under a literal and fair construction of the contract, there was power in the directors to let these rooms in this way, although the lease was one for several years.

Is not that case exactly ours? What is this company doing except providing for the use of their franchise? And if in this contract there were large words, such as *the use of all powers incidental to the power or conducive to the end in question*, are they, when you come to consider them, stronger words than those in the contract in question, which are that this company [the Camden and Amboy Railroad Company] shall have all powers necessary to perfect a complete communication between Philadelphia and New York? Now, we are not to-day standing where we stood half a century ago. What is necessary to-day to perfect a complete communication between New York and Philadelphia? We say that the answer appears in the declaration of the legislature in this act of 1870; that in order to perfect a complete communication there must be consolidation—or what is, in effect, equivalent to consolidation—between the United Companies of New Jersey and the Pennsylvania Railroad Company of Pennsylvania.

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But this act is constitutional, because the right of every dissenting stockholder is respected, and compensation is made to him. The steps in the procedure are the following :

1. The lease or contract is to be arranged for. 2. It is to be consented to by two-thirds of the stockholders of each company. 3. This consent, duly authenticated, is to be filed. 4. The lease is then to be made. 5. Stockholders may yet dissent; and then, 6. Payment is to be made, and the stock either taken or extinguished.

This is no novel mode of action. It began with these corporations in 1831, in the Marriage Act. It was again adopted by them in 1867, in the Marriage Act with the New Jersey Railroad Company, when the Camden and Amboy was permitted to commit polygamy. It has its counterpart in New York. In the laws of New York, of 1853, p. 113, your Honor will find the exact plan in all its details; a general law.

It was adopted in Pennsylvania, in the case of *Mott v. The Pennsylvania Railroad*, 6 Casey. It may be called a method of exercising the power of *eminent domain*; and it is so called in cases in New Hampshire, in a note to p. 664 of Sedgwick on Statutes. If not a method of exercising *eminent domain*, it is a plan for the attaining of justice when possible injustice is supposable.

Two points are made against this method of compensation. *First*, it is said it does not precede the taking, and, therefore, does not meet the requirements of the New Jersey Constitution; and *second*, it is said that it is not for "a public use," that this taking occurs.

As to its not preceding the taking, if there be anything whatever in this point, it is within the power of this court to obviate the difficulty. Let this court, if they have any doubt upon it, hold this cause and direct payment to any of these stockholders who come in before the absolute delivery of this lease, and all objection is obviated.

Remark, too, that this is a bill by stockholders generally. John Black, and other stockholders, sue for their own benefit,

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and for that of all other stockholders who may come in and desire the benefit of this suit. It is, therefore, possible so to wield authority, that if any man says, "I am not paid before I am injured," the court may reply, "you shall be; I will direct such an inquiry as is contemplated by the act as to the value; I will hold this cause until that inquiry is reported upon, and you shall not have it to say that you have been denied any privilege that belongs to you by the Constitution of your native state." And for this course, your Honor has direct precedent in a case already cited, of *Lauman v. The Lebanon Valley Railroad Company*, 6 *Casey* 42.

The counsel argue that we take their property when this lease is made; but they thereby beg the question entirely. The lease does not take that property away. If I let my house, does my tenant, in consequence, own my property? But that is a very insufficient illustration, because I *own* my house; but do the stockholders, in the legal sense, own the railroad? Can the stockholders sue for one iota of that railroad property? If a car is taken away by some person, if a locomotive is, by design, blown up or destroyed, can the stockholder come into court and say, "my property has been taken," and ask the court to restore it? Of course we all know that the contrary is the case. The stockholder in no respect owns the property; all he has, is an interest in the profits of the use of that property, and a right to defend the property itself in order that he may obtain those profits. Legally and equitably, the corporation owns the property. In no respect can the stockholder be held to own the property itself. He has a right and interest in it: the right of protection; the right that it shall be used; the right that from that use there shall come profit; the right that directors shall manage the property personally or by agency, and that that profit shall come to him regularly and honestly. And now do we meddle with this property when we make this lease? It is said that the perpetuity of the lease makes a difference, that here is a lease made for nine hundred and

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ninety-nine years; but as that lease is made, the argument, it seems to me, is in no wise true. But admitting its soundness, it does not follow that there would be a taking away of the property of the stockholder. There might be wrong done. To make a case of wrong actually done him, there must be shown a fraud upon him, in that they disposed of the subject matter of the corporation, and prevented him thereafter from deriving a profit from its use. But this lease, though it be for nine hundred and ninety-nine years, so long as it constantly pays a fair rent, and makes large and adequate remuneration, is not a passing away or a sale of the property; *length of time*, in such a case, makes no difference. If, under this lease, there was a payment in gross, then there would be, in equity, a perfect alienation of the property away from its owner, and the owner would have, instead of the property, the money which had been realized or produced by it; but so long as the property is merely leased, and there springs from it everlastingly *rent*, and that rent is such as the court recognizes as fair remuneration, (and which experience shows, in the present case, to be an average remuneration,) there is no alienation, and no sale, and no wrong either.

Now, the real truth here is this: This lease may injure the stockholder by depreciating the value of his stock, or it may profit him by causing it to appreciate. That is all that the lease can do. It cannot take his stock; it may injure it. We know that it will appreciate it. It has already done so, though of course that is public rumor. But that is our conviction, that it will do so; and they on the other side think it will not. It is then uncertain whether injury will be done or not, to that which is the object and right of the stockholders, to wit, getting profit out of the use of this property. It is, perhaps, impossible for the stock to be *taken*, in the sense of the Constitution, because it cannot be touched; it is not the subject of handling. The certificate is merely evidence of interest; it is no more the property than is the title deed of the estate. Is the stockholder any

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less a stockholder when this lease is made? Does he not still own his stock, himself? The property out of which he derived profit is placed in another condition of usefulness and profit, but it is there—it is just as much there as before. Could he not, after this lease is made, come into court and say, “I am a stockholder in the company. I own so many shares, being such and such a proportion of interest belonging to me in that company. Some other company has taken it away from the Pennsylvania Railroad Company to whom it was leased for use and profit, and they have not a sufficient title to it, and I want the aid of this court to help me, as a party having an equitable interest in that stock.” And if all this could be done, then plainly the Constitution does not apply when it speaks of private property being *taken*, because it is not taken and it cannot be *taken*. Injury can be compensated for, but that is all. Now, then, comes in the statute. The lease makes not the slightest difference as to *the right* of the stockholder; the only difference it makes is in the amount of profit he can receive. It does nothing more than add to the security of the profits by the covenant of others. The argument that this property of the stockholder is taken when the lease is made, seems really unworthy of its authors and of the attention given it. After the lease is made, the stockholder is given by the statute a limit of time during which to consider whether he is injured or not. If he makes up his mind that he is, then the law says to him, “have your stock valued.” The language there is very remarkable; it is to find out the “full value of his, her, or their stock immediately prior to such lease”—not “the market value,” though that may be held by the court to be a measure of the full value. When reading this bill and observing the earnest rhetoric with which the value of this stock is magnified, it would seem that this act provides a remedy when it says, there shall be assessed the full value of that stock immediately prior to the lease. But whether the companies take the stock, or whether it is simply extinguished, leaving things as they were before, is of no moment

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to the present controversy. We submit to your Honor that this law is entirely constitutional; and we wish, on that point, to draw attention again to the case of *Mott v. The Pennsylvania Railroad Company*, where such a provision was directly decided by the Supreme Court of Pennsylvania to be constitutional. 6 *Casey* 34.

Briefly, as to the other objection to this act—that the use is only private, not public. The act is for consolidation; that is the motive of the act. Though it is not subject to the same objection as is consolidation in stock, or even in business, yet the lease is as effective as consolidation, though it is not consolidation; for the United Companies remain intact, exercising powers of oversight, still protecting the rights of stockholders—the managers surrendering the authority over their subordinate agents, but nevertheless still existing as a distinct organization, and for the very purpose of promoting the interest of these stockholders by securing the most complete use of the franchise. But the effect is nevertheless exactly the same as if consolidation had been effected; and all the public good that the legislature contemplated in consolidation was not only meditated by them as arising from such a lease, but is actually attained by such a lease. What then is the motive of the legislature in enacting consolidation? Evidently the completion of the grand public purposes for which these companies were organized, by acquiring the largest through traffic. That is the public end. That would be a good public motive for granting a charter. If a charter could be granted to authorize transportation from Philadelphia to New York, without taking a ton of freight from any point along its way, would it not be a “public use?” What becomes of it at the other end? It must be landed from the cars; it must be warehoused; it must be re-shipped; it is the creation of commerce at that point.

For what was Harsimus Cove secured and preserved? It was for through traffic, nothing else; in the expectation that there would come to Jersey City from Pennsylvania, and all

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the world beyond, immense quantities of merchantable commodities requiring trans-shipment, and therefore *room*, and therefore *commerce*.

Let us think for a moment on this matter of the public interest in through traffic. What made New York the commercial metropolis of the western world? Her bay is rivalled by Newport, by Portland, by Portsmouth, by Hampton Roads; all her natural capacities for commerce belong apparently (and in some of these instances in a larger degree) to other places; but her command of the great natural highway from Albany down, first gave New York her prominence as a mercantile emporium. Then the Erie Canal, devised by the far-seeing ken of DeWitt Clinton, enlarging still the sphere of through traffic; then the Hudson River Road increasing the capacity of transportation, with its companion, the Harlem, and their connecting roads, the New York Central and the Boston Road; and then the Erie—Briareus of railroads I may fairly call it; these great means of through traffic have been the source of the prosperity and wealth of the city of New York. The experience of Jersey City and of Hoboken is the same. When the Morris and Essex got there from Easton, and the New Jersey Central from the same point—these roads connecting with others that went far into the interior—and when the Erie arrived after them, what activity and prosperity did they not engender? It was through traffic that did it all. And not alone have Jersey City and the Bay of New York been benefited, but who can estimate the benefit to trade and business all along their routes, which has resulted from the construction of those railroads, originally designed to be promotive of through traffic? In through traffic no trans-shipment is required, nor breaking of bulk; on the contrary, merchandise may be shipped from all parts of New Jersey direct to every part of the great West, the South, and the whole continent. If these are the advantages of through traffic, and if the legislature thought, as they doubtless did, that consolidation with the Pennsylvania Railroad would increase its

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facilities, or would hasten a result having that tendency, surely here is "public use."

No one can have observed the history of this country, or acquainted himself with that of Great Britain, without seeing that the necessities or conveniences of trade—in other words, the public weal, perpetually call for consolidation as a means of promoting traffic, of giving intensity to the energy of those who need these great public facilities. In New York, we notice the Central and the Hudson; the Erie, with a multitude of smaller roads. In New Jersey, the Delaware and Lackawanna has now absorbed the Morris and Essex; the Lehigh Valley has taken possession of the Morris Canal; the Erie has long ago appropriated the Paterson and Hudson and the Paterson and Ramapo. The United Companies themselves have appropriated numerous smaller tributaries, their works having served for years as a great river, into which ran from every direction rills of their own creation. They but follow the law of being, when they themselves to-day become, through this consolidation, a great trunk road, with which shall connect not only these, but the greater roads that actually cross the continent.

All this is not brought about by ambition or political design, but by *trade*. Thoroughness, completeness of execution and expedition in railroad duties, transportation without breaking bulk and without delay—these are the motives for railroad consolidation. Hence, experience seeks for consolidation; hence consolidation here; and, as soon as it is effected, the avenues of commerce will be improved and the public benefited, as was the legislative design.

Consolidation, too, tends to a proper obliteration of state lines. It binds a nation together, and makes us one. Suppose the line of the Pennsylvania Central to end at our state line, would it not be a public use to build a road which would connect it with our own? If consolidation would facilitate this connection, and promote vast trade, is it not a "public use?"

We have nothing to do here with the matter on political grounds. It may be unwise to trust these great corpora-

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tions. That argument is for another forum. If valid in this instance, then it was equally valid as against the Marriage Act, and against the whole system of consolidation as established in New Jersey. It is no stronger argument, to-day, in this period of greater advancement in transportation facilities and traffic development.

It is said the state has left it to the companies to declare the "public use." Not so; the state declares any such "consolidation," as is called for by the act, to be a "public use," and leaves the companies to determine with what particular company they will consolidate. The property to be taken for public use is designated. The "public use"—consolidation with any road with which the United Companies are identified in interest, or with which their roads form a continuous line—is plain. As an act generally leaves to a company, organized for railroad purposes, to determine upon its route, so the act in this instance leaves to these companies to determine with which road consolidation shall take place.

Another objection to the validity of this act is, that it places the highways of the state under control of a foreign corporation; and it is urged that the legislature have no power so to do. But why have they not the right so to do with this class of highways? Is it anything more than consenting that citizens of another state may come here, subject themselves to our laws, and then manage our corporations? If our highways were placed under foreign laws it would be another matter; but are they? When a company comes here and accepts the privileges which are given by the legislature of the state of New Jersey, do they not become bound to exert those privileges in the manner provided for by the state of New Jersey?

The court is familiar with a leading illustration of this manner of naturalization of companies, so to speak. The Erie has, for years, been the lessee and sole manager of two of our railroads, having absorbed a company organized for the purpose of building a tunnel, and has, by direct charter, been authorized, itself, to construct a railroad from that

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tunnel to its dock. And yet these lesser roads were all public highways, not only in the limited, but in the enlarged original sense of avenues for locomotion by the motive power of individuals as well as of corporations. Still has there been any difficulty between the state and the Erie Railway? Has that corporation brought the laws of New York into New Jersey and made them supreme? or has it not willingly obeyed the laws of New Jersey? Why not admit other citizens of the United States to the privileges of our own state?

It is difficult to perceive that a foreign corporation, as owner of our works, would prove a whit more dangerous to our liberties than foreign owners of a domestic corporation. The policy adopted by this act is no new thing in New Jersey. It is but a new instance of that policy which has, in truth, been her necessity, and in which she has been aided by her singularly advantageous location—the policy of inducing foreign capital hither. It was that policy which led her first of all the states, it is believed, to abandon jealousy of aliens, and to allow them to hold and convey real estate without restriction. It was that policy which, in the infancy of railroads, and when almost all her public men were ignorant of their character and capacity, led her to give a monopoly for crossing her territory, in order early to acquire the benefits of through railroad traffic. It was that policy which, within a few years, triumphed finally over the short-sighted economy which even yet hampers Pennsylvania, and established a rate of interest and an amendment of the usury laws, which has brought and is bringing, yearly, millions of foreign capital to enrich her. It was that policy which, some twenty years ago, permitted the consolidation of two of her roads—the Paterson and Hudson, and Paterson and Ramapo—with the Erie, under the effects of which incalculable benefit has arisen to Jersey City and Hoboken, as well as to the country through which these railroads pass. It was that policy which authorized the lease of the Morris and Essex to the Delaware and Lackawanna, by which that

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It appears that three companies, established by the state of New Jersey, in connection with a fourth one outside of the state, have been engaged for forty years, and are still engaged, in carrying goods and passengers between New York and Philadelphia. By their original act of incorporation, by a great many supplementary laws, and by direct contracts made between themselves, they have become so united together that the interest of one is the interest of all. But, although they are united and connected together, they are not consolidated; they are separate, distinct corporations, having separate officers, and a separate board of directors to represent the stockholders. They have separate duties to perform, separate rights and obligations, which are to be protected and enforced in separate proceedings at law and in equity.

Counsel here summed up at length the value of the properties of the United Companies, which, together with the franchises, the value of which, he insisted, the court could not ignore, he estimated at \$90,000,000.

The companies, by the use of this property, have made large gains. Taking the whole period that has elapsed since the first organization of these companies, thirty-five years ago; taking one year with another, allowing for all the mismanagement—deducting, also, the dividends that were not divided—the dividends that were divided actually amount to twelve and one-fifth per cent. The business is capable of indefinite expansion; it must increase. The general business of the country doubles itself in every twelve or fifteen years. I think that these companies have doubled their business every nine and a half years. While business goes on increasing in that way, the relative cost of conducting it decreases; the profits increase more rapidly than the business. The amount then that may be made out of these roads will startle us even to think of. The companies have done great public service. There are thousands of men in this state:

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who owe their large fortunes in some way, directly or indirectly, to these companies. They have added to the prosperity of the state; they have behaved impartially to their own and to other states. They have promoted the general commerce of the country, and have done justice to those who did not belong to this state.

Besides the interest which the stockholders have, arising out of their rights to receive the very large profits which they may fairly look for, the state herself has a proprietary interest—an interest as an owner. The state is one of the stockholders of some of these companies, and she has an additional interest in the property which belongs to them—the right to take at a certain time the whole of that property in her own hands, at a certain fixed price, very far below the true ascertained value of it. You have the fair right to infer from the facts which are before you, that this additional asset is worth not less than \$15,000,000.

After the directors of the United Companies and the Pennsylvania Railroad Company agreed upon their treaty, or compact, or bargain, for it is all these, but not a lease—they were nearly as far as ever from accomplishing their design, because the power to make the contract, even according to their own construction of it, was coupled with the condition that they should get the assent of at least two-thirds of the stockholders. In regard to the board of directors, I have to say that the general board passed upon it. It was not adopted nor agreed to by a concurrent majority of the several boards, but only by a majority of the general board, so that, for aught that appears, these stockholders, or some of them who own stock in one of the companies, may have had their rights passed upon, and their property taken away from them, without the consent of anybody who was ever trusted by them to represent them in anything. For this majority may have been made up, and in point of fact was made up, of members of two of the boards, who over-bore by their votes the members of the third one. After this it became necessary to get the ratification of two-thirds

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of the stockholders. They accomplished this by appointing a committee of five agents, to go out among the individual stockholders and canvass them separately, and in this way we have reason to apprehend that they either have, or will have got, two-thirds of the stockholders to sign away our rights as well as their own.

Now, if those directors, together with the Pennsylvania Railroad Company, have the right to all the things which they claim, there are two fatal defects in the execution of the power, which alone are sufficient to entitle us to this injunction, if there were nothing else in the case. The first of those defects is, that the contract was not submitted to the directors of the several companies, and passed upon by them, but that it was submitted to the whole board of directors sitting together, whereby the rights of these complainants, and other stockholders, were passed upon by persons who had no authority whatever to represent them, against the consent and against the wishes of those who had authority to speak for them.

In that law, which they claim as their justification, your Honor will find it is simply necessary to have the consent of directors to the contract. It does not say how they shall pass upon it—whether the directors shall sit separately, or whether they shall unite together, nor what shall be considered as a consent of the directors. But, most assuredly, every just interpretation of the law requires that the directors of each company should have an opportunity to deliberate upon it, and pronounce their own separate judgment.

Where a law authorizes a thing to be done by the directors of several different companies, each company having a separate existence and a separate board of directors, it must be perfectly manifest that they are to act separately, and especially is this true where the act that is done, when it is done, is to destroy the separate lines of the companies, and take away their interest.

The other objection to the execution of this power is still more fatal, as it seems to me. Immediately after the con-

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tract was assented to by the members of this general board of directors, a meeting for some purpose happened to be held by the stockholders of one of these companies, I do not recollect which, and that body of stockholders passed a solemn resolution, calling upon the directors who had agreed to this contract, to have it printed and distributed among the stockholders, and to call a meeting of the stockholders, in order that they might deliberate upon the subject and determine whether the contract ought to be ratified or not; and by which the directors acting in the interest of the Pennsylvania Railroad Company, and others, recently tried to spread their agents over the state, to gain, by personal solicitation, what they knew they never could by any open or fair examination of the subject. Of course, I do not know what was said to each of these stockholders, what inducement was held out to them, to put their names to that piece of paper; but I am sure, so must you be—so is everybody who knows anything about the fact—that they did not disclose to them the whole case; they could not get around to each one of the stockholders and tell them the facts of the case, and the very obscure provisions of that contract.

According to the effect which these gentlemen claim, this consent is not merely a surrender of the rights of those who signed it, but it is against our rights. They say it divested not only their own right and title to this large property, but it divested the rights of those who were never consulted, publicly, at all. I maintain it to be a rule of law too clear for dispute, that where any matter or thing is left by *cestui que trust*, or by judicial order, or in any other way, to be determined by any number of persons more than one, or a majority of the number to whom it is submitted, that such power cannot be exercised by those to whom it is committed separately; they must be called together. This is void upon another principle. These men are our trustees, they had the business of our property upon their hands—when I say ours, I mean the whole of the stockholders; and it is an undoubted rule, that, whenever a trustee wants a bargain to

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be made by his *cestui que trust*, which will release the trustee from any obligation which he would otherwise be under, he must, before he can make use of the contract, show not merely that it has been executed by the *cestui que trust*, but that it has been executed upon the consideration of all the facts which may be adduced.

These parties have no power to make this contract. All the parties in the contract are corporations, and we have insisted that all of these corporations are destitute of those powers which they have undertaken and attempted to exercise in this case. Whenever a corporation undertakes to do anything which it is not specially authorized to do by the law of the state which created it, its act is void.

Had then the Pennsylvania Railroad Company the power, in its corporate character, to come over into the state of New Jersey and perform the things which it has undertaken? If it had, then it has derived that authority from the law of Pennsylvania, outside of which every act which it attempts to do is *ultra vires* and void. An examination of the laws of Pennsylvania will show beyond doubt, that a corporation has only such power as is plainly laid down. It has been decided over and over again, by the Supreme Court of that state, that there can be no such thing as a doubtful charter, because whenever you raise a doubt about the meaning of any word or phrase, the doubt is immediately decided against the corporation. An act of incorporation for an act for extending the powers of a corporate body, is made certain by the very obscurity of the words in which it is written. It is necessary to establish this doctrine as a universal and infallible rule, because if it had been otherwise, the legislature might be induced to pass a law which, although it might seem to be perfectly harmless, was really pregnant with the greatest mischief.

The Pennsylvania Railroad Company procured from the state of Pennsylvania a law authorizing them to become the lessees of any railroad outside of that state. I admit that the Pennsylvania Company has authority from the legislature of

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that state, to go into any state and there become lessees of railroads and canals. I deny, however, that they have any power which extends to other subject matter than railroads and canals. I deny that they have power to do anything with railroads or canals except to lease them. They came into the state of New Jersey, however, and, instead of leasing them, they bought both of them out.

Applying the rules of strict construction which prevail in Pennsylvania, I contend that the act of 1870 and the act of 1871, of the legislature of Pennsylvania, and the act of 1869, do not all, or either of them, give to that corporation the privilege of doing the things which it has undertaken to do by this contract. When they accepted the authority to make a lease they did not get the authority to make a purchase. On the contrary, the power to make a purchase being withheld, it is entirely forbidden, and it is a fraud upon the state which confers the power to lease, to make use of that power, and under the color of this to make what is practically a purchase. Nevertheless, they came here, and with the power to lease canals and railroads within the state of New Jersey and elsewhere, they did not make a lease of either, but they made a purchase of both. This reservation of an estate in the vendor, which is to be enjoyed and take effect after the expiration of nine hundred and ninety-nine years, does not diminish the value of the estate which is granted to the Pennsylvania Railroad Company one whit, nor does it add one farthing to the value of the estate in our hands. It is not worth anything to either party. To call this contract, therefore, a lease and not a purchase, because of that reversionary right which is to be enjoyed at the end of a thousand years, is a mere mockery. Long before that time comes around it will take a skillful antiquarian to decipher the lost and forgotten language in which this lease is written. Look back a thousand years. There is but one single institution now existing that stood a thousand years ago, and that stands because its divine founder built it upon a rock, and pronounced the omnipotent decree that the gates of hell

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should not prevail against it. All the rest have been swept away by the floods of time.

I repeat that these people, when they took the power to make a lease, made a solemn promise that they would not, under any circumstances, make use of it for the purpose of making a purchase, which they were forbidden to do. They pretend to be doing one thing when they are doing another. All courts of justice, and courts of equity especially, are bound to look at the substance of things, and not at the mere form in which the parties have chosen to put them. The insertion of those words which are intended to make this a lease, is only calculated to excite that disgust and indignation which every honest man is bound to feel when he looks upon that which he knows and feels to be a breach of faith. The courts hold that that kind of bad faith which keeps within the letter of the law but breaks the spirit of it, is a great deal worse than no pretence of fulfillment at all.

The act of 1869 may be a justification of the lease, but you cannot stretch that act so as to extend it over one-twentieth part of the things that are made the subject matter of this contract. These things bring me to the conclusion that any stockholder of the Pennsylvania Railroad Company, or the Attorney-General, on behalf of the commonwealth of Pennsylvania, could go into a court on the other side of the line and bring a bill to restrain this corporation from making this contract; and the courts of that state would be compelled to declare it utterly null and void.

I do not deny, and one of the reasons why I do not deny is because I do not care whether it is true or not, that a corporation merely private, established in one state, has a right to go into another state and then do whatever it is authorized to do by the laws of the other state. The corporation of Pennsylvania comes here for the purpose of taking possession of the public highways of New Jersey, and for the purpose of regulating and controlling, to a certain extent, the commerce and trade of New Jersey and the commerce

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and trade of our sister states. I suppose that it is not necessary for me to establish that this is a power which, in all times past, in all countries, ancient and modern, has been regarded as belonging, necessarily, to the sovereign power of the state. New Jersey, more, perhaps, than any other state in the Union, by her geographical position, owes it to her own honor and conscience, and not only to her own people, but to the commercial world, that she should perform this duty as impartially as possible.

Now, she may perform that duty herself, that is by the direct and immediate agency of her own authorized representatives, reimbursing herself by a general tax upon all of her people, or by a special tax imposed upon those only who use the facilities which she has furnished; or she may do what she has done, that is, employ a servant, or any number of servants, on other terms than she employs her public officers. She may create a corporation, or corporations, for that purpose, and delegate the duty to them under direction and control. When she bestows that power on a corporation, it becomes just as much her servant as are her executive and ministerial officers. In selecting an agent or servant of this kind, I do not pretend to say that the commonwealth is under the necessity of confining herself to her own citizens; nor do I assert that it is my objection that she takes a set of men already incorporated in another state. If, therefore, the franchises which belong to these United Companies were forfeited by some act of the corporation, or if surrendered by the unanimous consent of all the stockholders to the state, and the state should resume these franchises, she might make a re-grant of them to the people who compose the Pennsylvania Railroad Company. But that would be simply making those persons who are now a Pennsylvania corporation a New Jersey corporation.

Now, the legal proposition is that these franchises and powers and privileges to take charge of the public highways, and to perform the great public function which belongs to the sovereign state of New Jersey, with reference to the

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trade and commerce of New Jersey, cannot be held by anybody, unless they be held by virtue of a direct grant immediately from the state, made through her supreme legislature; and the grant then made in that way, and coming from that, the highest of all sources, is invalid, unless it be coupled with the imposition of a direct responsibility on the part of the grantee to the state, for the faithful performance of all the things which are correlative to the exercise of such a power.

I hope I am understood. If I am, then your Honor sees two fatal objections to this contract. It transfers to the Pennsylvania Railroad Company a very important portion of the sovereignty which belongs to the state of New Jersey, and takes away from the place where the state has deposited it, and totally out from under her control, one of the most important functions of her government. Another objection to it is, that it is an exercise of legislative power by parties who have not been entrusted with any such privileges. It is impossible to suppose that the legislature has the right to depute ten or twelve individuals, and say that they may make laws; that they may establish corporations with great public power; and, least of all, can that sort of power be entrusted to the directors of a private corporation? Especially is it improper, and even absurd, to allow such a power as that to be exercised by men who will acknowledge to you that they do it entirely with reference to their own interest.

But then I maintain that even if the legislature itself, in the most solemn manner that you can conceive of, and according to all the forms of organic law, should undertake to confer a power like this upon any individual, or any corporate body, that the grant of such a power is utterly worthless and invalid, if it be not accompanied with the imposition of a direct responsibility to the state of the exercise of the power by the grantees when they get it. Will the counsel on the other side tell us that the state can control this matter; that there is here any direct responsibility to the state, by virtue of which the state, whenever it finds the Pennsylvania Railroad

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Company misbehaving itself, can come down upon it? I say no. On that covenant, nobody on earth can sue. They say that the United Companies may suffer whatever the state may choose to impose, and then the companies must recover from the Pennsylvania Company, and, by this circuit of action, justice will be reached at last. Well, I do not believe that for any public mischief which may be done by the Pennsylvania Railroad Company, the New Jersey Companies can recover damages, or bring suit on that covenant. The consequence of this lease taking effect, if your Honor permits it ever to take effect, will necessarily be that these companies, who were responsible to the state heretofore, with their corporate life for anything that was injurious to the public done by them, will have stripped themselves of all their property, so that you cannot reach them, and, with the consent of New Jersey, they have disarmed themselves utterly and completely of all power to perform the duties imposed upon them by their charter. This is a previous pardon—a condonement before hand; it is a plenary indulgence to sin as much as they please.

Now, a most important question arises. Has the state of New Jersey ever consented to put herself in this anomalous position? Have the members of the legislature, or any one of them, ever expressed the intention that is imputed, of so degrading this commonwealth, whose dignity and rights they are bound to protect and preserve? No such thought as that was ever in the minds of any legislative body that ever sat in the state of New Jersey. I can prove it by the only evidence of which such a fact is capable—that is, by taking up the statute book and showing, from beginning to end, no thought of that kind was ever expressed, and, as it is not expressed in a matter of this kind, that must be taken as conclusive evidence that it was not intended. Look now at the only law which is referred to as any justification of this contract. Before doing so, let me remind

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you that the rules of strict construction are adhered to in New Jersey ; that they are adhered to everywhere.

No court on earth has a right to assume that a thing is meant when it is not clearly expressed. See whether this tremendous power was intended to be given, and, if given, what words are used to express that intention : “They may lease to or consolidate with any other railroad or canal company or companies in this state, or otherwise.” “Consolidate with any other canal or railroad company.” The generality of these words might excuse an argument in favor of the power to bargain for consolidation or lease with any corporation that could be found anywhere in the world. But that would not be the true construction. It is perfectly certain that, when the legislature went on to say “any other corporation in this state,” they surely meant to confine the companies to domestic corporations.

As to the words “or otherwise.” Whenever a word of doubtful meaning occurs in a statute of this kind, it means nothing that can be made valuable to the grantee claiming privileges under it.

The state of New Jersey, by her geographical position, holds the key to the city of New York for all the commerce that passes over both of these roads through Philadelphia. Up to the present time, she has done her duty ; she has behaved with perfect impartiality toward the Baltimore and Ohio Railroad and the Pennsylvania Railroad.

Now, it is proposed that the Pennsylvania Railroad Company shall have absolute and unlimited power, not only with reference to the trade that she brings herself, but she may make what discrimination she thinks proper, and thus what produce which may be on its way to New York over the Baltimore and Ohio Road, is stopped at Philadelphia, or it is taxed to death before it reaches New York. I take it that the legislature of New Jersey have neither the moral, legal nor constitutional right to do that thing. One of the purposes of the Constitution of the United States goes to prevent

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that kind of improper partiality between the commerce of one state and that of another. It is a purpose to which, if the state of New Jersey lends herself, she must and will stand disgraced forever before this nation.

But we have been told that these public considerations ought to be suppressed here; that this is a private bill, brought by private parties, in vindication of private rights. In other words, we are required to submit to the operation of a void contract which robs us,—for we are able to say it is void, because the persons who went into it had no authority to do so. On the same principle, if this contract was a forgery, we would not be permitted to show it. This contract is an invasion of our private property. There was some argument made here which I was not able to comprehend exactly, and from which it seems to have been intended to draw the inference that this was not properly private property. Undoubtedly every man who owned any portion of this stock may say, “It is mine, and I will keep it until I choose to part with it; and when I do make up my mind to let it pass out of my hands, it shall be for such a consideration as I deem an equivalent, and I will not allow the purchaser to put his own price upon it; nor will I part with it for a price that may be put upon it by any third person.” Being private property, it is within the protection of that provision of the state and federal Constitution which declares that no man shall be deprived of his property except by due process of law; and surely no man will say that we are deprived of this by due process of law, when it is taken from us by a clandestine contract, made behind our backs, without consulting us, contrary to our wishes and against our will. Before your Honor assents to this proposition, I suppose you will make up some reason or another which will be satisfactory to the general mind as well as to your own conscience. It will be necessary for you to show two things: first, that the legislature of the state of New Jersey has actually authorized this thing to be done; has placed upon her statute book a command that the contract which we had

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before shall be abolished, and another contract, to which we never consented, shall be substituted in its place, if it be the will of the directors of two companies and two-thirds of the stockholders thereof. And after you have done that, you will not have accomplished your object unless you can do this also, and that is to raze out from the Constitution of New Jersey and the federal Constitution that which declares that no legislature shall have the power to do any such thing.

A very large portion of the property which is transferred to the Pennsylvania Railroad Company by the contract, consists, some of it of actual cash, some of it of choses in action, bonds and bills receivable, which can be sold in the market immediately, surplus real estate, surplus floating and rolling stock, amounting in all to \$15,000,000; that the present companies might, without violating any obligation of their charters, or without disabling themselves in any way from the future performance of their duties, convert into cash and divide among themselves. All this goes to the Pennsylvania Railroad Company. In addition to that, the Pennsylvania Company gets \$6,250,000 of stock issued for their own special use. It is true there is a stipulation contained in this contract which shall apply at least a portion of the money thus received to the improvement of the works; but they are bound to make no particular improvements; if they make none at all, they cannot be made to fulfill this part of the contract. They may make improvements anywhere on their seven thousand miles of road, and claim that they have fulfilled the contract.

A question has been raised whether this is an exercise of a right of eminent domain. Of course all the arguments on that subject are good for nothing, if the legislature did not intend the right to be exercised in that way. There is no question here about public use, if you can say that this is a taking of eminent domain, this taking of property from one person and handing it over to another person who does

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not own it. Assuming that the legislature intended what they say it did, it is simply an attempt on the part of the legislature to suspend the eighth commandment.

THE CHANCELLOR.

The complainants in this case are stockholders in the three corporations who are the defendants. The object of the bill is to restrain these corporations from executing a contemplated contract with the Pennsylvania Railroad Company, by which the works of the defendants are to be leased to that company for nine hundred and ninety-nine years, for an annual rent of ten per cent. on the amount of their capital stock. The matter before the court is an application for a preliminary injunction.

The aggregate capital stock of the three defendants, consists of one hundred and eighty-nine thousand nine hundred and four shares of \$100 each, of which the twenty-one complainants own three thousand four hundred and fifty-five shares, being a little more than one fifty-fifth of the whole. The bill is filed for the benefit of the complainants, and all other stockholders of the defendants, who may join therein.

The defendants are The Delaware and Raritan Canal Company, The Camden and Amboy Railroad and Transportation Company, and The New Jersey Railroad and Transportation Company, all incorporated by special charters. The first two, incorporated by charters passed February 4th, 1830, were consolidated by an act passed February 15th, 1831, and have since been commonly known by the appellation of the Joint Companies. In their business affairs, and in legal proceedings, the joint name was retained, and their affairs were managed by a joint board composed of the directors elected by each company, according to its charter. The charter of the New Jersey Railroad Company was passed March 7th, 1832, and it was consolidated with the Joint Companies by virtue of an act of the legislature authorizing it, passed February 27th, 1867, confirming an agree-

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ment made on the first day of that month. By this they were only consolidated in interest, the stock and corporate existence of each remaining as before, but were governed by a joint board, composed of the directors of all. They have since been commonly known by the name of the United Companies of New Jersey, but have not adopted or assumed a corporate name for the consolidated companies, as authorized by the act.

The Canal Company was authorized to construct a canal from the Delaware to the Raritan, and a feeder to supply it with water from the Delaware. The Camden and Amboy Railroad Company was authorized to construct a railroad from the Delaware, opposite Philadelphia, to Raritan Bay, with steamboats at both extremities, to convey passengers and freight from the city of New York to the city of Philadelphia, so as "to perfect a complete line of communication from Philadelphia to New York." It was authorized, after the main line was completed, to construct a lateral road from the main road to the Delaware, at Bordentown. The New Jersey Railroad Company was authorized to construct a railroad from some point in the city of New Brunswick, to the Hudson river, opposite the city of New York, with power to construct a branch to any ferry on that river, opposite the city.

In the act of 1831, to consolidate the Joint Companies, it was provided that any stockholder of either, who dissented, should be paid back the price of his stock, with interest; neither work being then constructed. And in the act of 1867, to consolidate the United Companies, it was provided, that each dissenting stockholder should be paid the value of his stock, to be appraised by commissioners.

The Joint Companies, by an act passed March 15th, 1837, were authorized to construct a railroad from the southwesterly end of the New Jersey Railroad, in the city of New Brunswick, to Trenton, and thence to connect with their road at or south of Bordentown; with a spur to the Trenton Delaware Bridge. This act made no provision for dissen-

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tient stockholders. In 1835 the Joint Companies, by an agreement with the Trenton Delaware Bridge Company, of which they owned a majority of the stock, were allowed to lay rails upon the bridge over the Delaware, at Trenton, and to use it for their trains. And in 1836, they made an agreement with the Philadelphia and Trenton Railroad Company, whose road run from the west end of that bridge to Philadelphia, by which that road was used as a part of the line of the Joint Companies to Philadelphia, and by which the clear profits of these three companies should be divided among all their stockholders, share and share alike.

The Joint Companies constructed a canal from the Delaware to the Raritan; a railroad from Camden, through Bordentown, to South Amboy, and provided steamboats at either end, to New York and Philadelphia, so as to make a complete line of communication from one city to the other; and also a railroad from the western extremity of the New Jersey Railroad, in New Brunswick, through Trenton to Bordentown, with a spur to the Trenton bridge, and laid rails on that bridge to connect with the Philadelphia and Trenton Railroad. The New Jersey Company constructed its road from the west boundary of New Brunswick, to the Hudson, at Jersey City, near the ferry of the Jersey Associates, but did not construct a branch to any other ferry. These works were all completed, as required by the acts authorizing them.

In this manner, besides the canal from the Delaware to the Raritan, three complete lines of communication between New York and Philadelphia were perfected: One, from New York to Amboy by steamboat, from Amboy to Camden by rail, and from Camden to Philadelphia by steamboat; the second, from Jersey City, through Newark and New Brunswick, to Trenton, and over the Trenton bridge and the Trenton and Philadelphia Railroad, into Philadelphia; and the third, by using the second to Trenton, then by the road from Trenton to Bordentown, and passing on the first from

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thence to Philadelphia. Each of these lines was a continuous line from New York to Philadelphia.

Each of these companies had, with the authority of the legislature, but without the express assent of its stockholders, varied and changed its located route, and constructed branches not authorized by its original charter; and had purchased stock of other corporations deemed auxiliary to its own, guaranteed their bonds, and leased their works. Each had established and maintained a ferry at the termination of its road, over the Hudson and Delaware respectively, not for its own passengers merely, but for the public; and for this purpose the New Jersey Railroad Company had purchased, at the cost of nearly half a million of dollars, the capital stock of the Jersey Associates. These things were done, sometimes with, sometimes without special authority of the legislature, always without the express assent of the stockholders.

These lines were the only canal and railroad routes authorized by the state, by which passengers and freight coming to Philadelphia from the West, could cross the state to New York. The Pennsylvania Railroad Company owns or controls the railroads which are the chief means of communication from the western states, including California, to Philadelphia. This company made an agreement with the Joint Companies in 1863, by which freight and passengers coming over its road, and the roads controlled by that company, to Philadelphia, should be carried to New York over the roads of the Joint Companies without change of cars, and the fare and freight received should be divided according to the distance passed over the respective lines.

The depot and other terminal accommodations at Jersey City, barely sufficient for the proper business of the United Companies, were found inadequate for the freight business from the West, which was coming over the Pennsylvania Railroad. The United Companies, to provide for this need, in the autumn of 1867, purchased of the owners, the Harsimus Cove property at Jersey City, extending from South.

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Second street to South Seventh street, giving them a front of thirteen hundred feet on the Hudson, opposite New York, and containing about seventy acres. This purchase was made at the cost of near half a million of dollars, without any special authority from the legislature, and without any express assent of the stockholders.

By virtue of an act approved March 30th, 1868, the right of the state to the lands in this purchase, with the right of reclaiming lands under water, was conveyed to the United Companies, for the price of \$500,000. This act authorized them to construct a branch road from this property to the New Jersey Railroad, at Bergen Hill. To this act the assent of the stockholders was not required or obtained. And, as is alleged, the United Companies have expended about \$600,000 in procuring the right of way for the branch so authorized by this act; and the improvement of this property for use will require several millions more.

By an agreement made between the Joint Companies and the Pennsylvania Railroad Company, in 1863, that company agreed to construct, and did construct, a railroad called the Connecting Road, from the Philadelphia and Trenton Railroad, at Frankford, to its own road, at Mantua. By this, a continuous and connected line of railroad was completed from Jersey City to Pittsburg, and farther west, so that passengers and freight could be transported from Jersey City, and also from Amboy, in the same cars in which they were there placed, to Pittsburg. The Pennsylvania Railroad had a branch road to the Delaware at the foot of Washington street in Philadelphia, and the Joint Companies connect with it there, by a ferry from the terminus of their railroad at Camden.

In this situation of their works, connections, and contracts, the defendants, jointly with the Philadelphia and Trenton Railroad Company, agreed with the Pennsylvania Railroad Company to enter into the proposed contract with that company. The terms of that contract have been settled and agreed upon, and the joint board of the directors of the

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thence to Philadelphia. Each of these lines was a continuous line from New York to Philadelphia.

Each of these companies had, with the authority of the legislature, but without the express assent of its stockholders, varied and changed its located route, and constructed branches not authorized by its original charter; and had purchased stock of other corporations deemed auxiliary to its own, guaranteed their bonds, and leased their works. Each had established and maintained a ferry at the termination of its road, over the Hudson and Delaware respectively, not for its own passengers merely, but for the public; and for this purpose the New Jersey Railroad Company had purchased, at the cost of nearly half a million of dollars, the capital stock of the Jersey Associates. These things were done, sometimes with, sometimes without special authority of the legislature, always without the express assent of the stockholders.

These lines were the only canal and railroad routes authorized by the state, by which passengers and freight coming to Philadelphia from the West, could cross the state to New York. The Pennsylvania Railroad Company owns or controls the railroads which are the chief means of communication from the western states, including California, to Philadelphia. This company made an agreement with the Joint Companies in 1863, by which freight and passengers coming over its road, and the roads controlled by that company, to Philadelphia, should be carried to New York over the roads of the Joint Companies without change of cars, and the fare and freight received should be divided according to the distance passed over the respective lines.

The depot and other terminal accommodations at Jersey City, barely sufficient for the proper business of the United Companies, were found inadequate for the freight business from the West, which was coming over the Pennsylvania Railroad. The United Companies, to provide for this need, in the autumn of 1867, purchased of the owners, the Harsimus Cove property at Jersey City, extending from South.

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Second street to South Seventh street, giving them a front of thirteen hundred feet on the Hudson, opposite New York, and containing about seventy acres. This purchase was made at the cost of near half a million of dollars, without any special authority from the legislature, and without any express assent of the stockholders.

By virtue of an act approved March 30th, 1868, the right of the state to the lands in this purchase, with the right of reclaiming lands under water, was conveyed to the United Companies, for the price of \$500,000. This act authorized them to construct a branch road from this property to the New Jersey Railroad, at Bergen Hill. To this act the assent of the stockholders was not required or obtained. And, as is alleged, the United Companies have expended about \$600,000 in procuring the right of way for the branch so authorized by this act; and the improvement of this property for use will require several millions more.

By an agreement made between the Joint Companies and the Pennsylvania Railroad Company, in 1863, that company agreed to construct, and did construct, a railroad called the Connecting Road, from the Philadelphia and Trenton Railroad, at Frankford, to its own road, at Mantua. By this, a continuous and connected line of railroad was completed from Jersey City to Pittsburg, and farther west, so that passengers and freight could be transported from Jersey City, and also from Amboy, in the same cars in which they were there placed, to Pittsburg. The Pennsylvania Railroad had a branch road to the Delaware at the foot of Washington street in Philadelphia, and the Joint Companies connect with it there, by a ferry from the terminus of their railroad at Camden.

In this situation of their works, connections, and contracts, the defendants, jointly with the Philadelphia and Trenton Railroad Company, agreed with the Pennsylvania Railroad Company to enter into the proposed contract with that company. The terms of that contract have been settled and agreed upon, and the joint board of the directors of the

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This rule is founded on reason and principle. The franchises granted by the state are often parts of the sovereign power delegated to a subject, and always privileges to which other citizens are not entitled. In these grants the state is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchise of maintaining a canal and railroads across public highways and navigable rivers, and of taking tolls and rates of fare fixed by themselves without control, are with others a material part of the property leased; these cannot be leased or aliened without consent of the state.

The act of 1870 clearly grants the power to the United Companies to consolidate their own capital stocks, and to consolidate their stocks or business with any other connecting railroad in the state; but it is contended that it does not authorize such consolidation or connection of business with any corporation of another state. The question depends upon the meaning and effect of the word *otherwise*. This is certainly an inapt word to designate companies out of the state, by being placed in apposition to the words "in this state." It is inapt, because its proper use is to express difference of means or manner, and not of place. The word is used here in a way that admits of no change of place in the sentence, even if such change can ever be permitted. "Companies *in this state*" are one subject of the provision; the word *or* plainly denotes that some other subject is to be indicated. If the word *elsewhere* or *otherwhere* had been used, it would have appropriately expressed the meaning intended. The radical meaning of the word *otherwise*, which is always a relative word, is "different from that to which it relates," and the phrase to which it relates in this case, both from location and the sense, is clearly the words "in this state." It means companies different from or other than companies in this state. This is the meaning that I think would strike every one upon the first reading of the sentence. But any one

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conversant with the correct use of language would be struck with the inappropriateness of this word to express the meaning. It is a case of bad grammar, and not of doubtful meaning. The maxim "*mala grammatica non vitiat chartam*" applies to statutes as well as to deeds. If a statute provided "that if any father or mother should chastise a child so as to maim it, he or *her* so doing should be guilty of felony," a guilty mother would hardly escape on the ground that the word *her*, by which she was included, could not be applied to "be guilty," because the rules of grammatical construction and the settled use of language forbid it. Something was intended by the use of this word, and a settled rule of construction requires that no part of a statute shall be disregarded if any effect can be given to it. *Den. v. Dubois*, 1 *Harr.* 293. And where the intention of the legislature is plain, the words of the statute must be construed according to that intention. No one can read this statute, either in a cursory manner, or with deliberation and repeated reading, without being convinced that such was the intention, and that the words used express it, although awkwardly, inappropriately, and ungrammatically.

It is a rule of construction, that all grants from the state, and grants of franchises and exemptions in charters, must be construed strictly, and most strongly in favor of the public and against the grant. The object is to protect the public against improvident grants, and grants made by implication, without clear intention. And such grant will not be sustained by doubtful words. Ambiguity in such grant vitiates it. But this rule is qualified by another, that such grant, and the statute making it, must receive a reasonable construction, and not be so construed as to defeat the intention of the legislature, and that the ambiguity must be such as is not removed by the settled rules of construction. *Sedg. on Stat.* 259 & 327; *State v. Newark*, 4 *Dutcher* 529; *Wright v. Carter*, 3 *Dutcher* 76; *Briggs' case*, 2 *Zab.* 644; *Bridge Proprietors v. Hoboken L. & I. Co.*, 2 *Beas.* 81; *Del. & Rar. Canal Co. v. Rar. & Del. Bay R. Co.*, 1 *C.*

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E. Green, 372; *Richmond R. Co. v. Louisa R. Co.*, 13 How. 81; *Perrine v. Ches. & Del. Canal Co.*, 9 How. 172; *Pennock v. Coe*, 23 How. 132; *Rice v. Railroad Co.*, 1 Black 380; *Phila. & Erie R. Co. v. Catawissa R. Co.*, 53 Penn. 20.

This act can hardly be considered a grant from the state, or to fall within the reason of the rule requiring strict construction in all such grants. The state here parts with no property, and creates no new privilege or franchise that can affect the public. It simply permits a new arrangement or contract as to privileges and franchises already granted. It enlarges none. It clearly allows such arrangement with companies in the state; and the only question is, whether it shall be allowed with like companies of another state.

It is also urged that the Pennsylvania Company is not within the purview of the act, because their works do not form connected or continuous lines with the works of the defendants. I think that the lines are both continuous and connected. The works of the Camden and Amboy Railroad Company extend from New York to Philadelphia. It was so held in the *Briggs case*, 2 Zab. 623, and in *The Delaware and Raritan Canal Company v. The Raritan and Delaware Bay Railroad Company*, 1 C. E. Green 321, and 3 C. E. Green 546. They extend to the foot of Washington street, at Philadelphia, to the railroad of the Pennsylvania Railroad Company. Thus their works, though not their railroads, form a continuous line. Also, the road of the Camden and Amboy Company, at Trenton, is *connected* by three intervening roads with the Pennsylvania railroad. They are not continuous; that implies, without interval or interruption. Railroads can be connected, either directly or by intervening roads. The provisions of the Acts of Pennsylvania show this; their phrase is, "connected directly or by intervening roads." In either way they are connected; if directly connected, they are also continuous. And the fact that this act uses the word "connected" after "continuous," for the obvious purpose of adding something to the extent of

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the provision, shows that the intention was to include roads connected, not directly, but by some intervening or connecting road.

It is also urged that the means proposed are beyond the powers in the statute; that the authority is to lease, but that the proposed lease for nine hundred and ninety-nine years is, in reality and substance, a sale, though in name a lease. This term is no doubt practically equivalent to the fee; but it differs radically from a sale, because it is for rent reserved during the term, with power of re-entry. The distinguishing feature of a sale is, that it is for a consideration paid, and extinguishes all right to the property. This is, in substance as well as in form, a lease. The act of 1870 is, in my opinion, authority by the state to make the proposed contract and lease.

The complainants further insist, that even if the act authorizes the making of this contract as far as the state is concerned, yet that against them it is invalid, as it impairs the obligation of a contract existing between them and the defendants, arising out of the charters and their subscription to the stock. This contract they claim to be, that the roads and canal shall be maintained and operated by directors chosen by the stockholders, for their benefit, and the whole net profits divided among them as dividends; and that this contract continues without limit of time, unless every stockholder shall consent to change or terminate it. It is settled that a charter without reservation of the power of repeal, is a contract between the state and the corporators, which can not be altered without their consent. It is also settled, by many decisions, that a corporation cannot use the capital stock of the company for any enterprise substantially different from that authorized by the charter, as the stock is subscribed and paid in for that purpose, and that only, which raises a contract not to apply it to any other; and that, when persons enter into partnership, or become incorporated for a specified object or business, and the articles or charter stipulate that the business is to be continued for

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a time specified, the business cannot be abandoned within that time, except by the consent of all the partners or stockholders. See *Zabriskie v. Hack. & N. Y. R. Co.*, 3 *C. E. Green* 178, and the authorities there cited.

But there is no case that holds that a majority of corporators, where a time is not specified for which the enterprise must be continued, may not abandon the enterprise and sell out the property of the company. The dictum of Parker, Master, in *Kean v. Johnston*, 1 *Stockt.* 413, is the only authority which I find in support of the doctrine. The dictum, in my own opinion, in *Zabriskie v. Hack. & N. Y. R. Co.*, 3 *C. E. Green* 193, that a single stockholder can prevent all others from changing or abandoning the work, must be taken with the qualification annexed to it in the former part of that opinion, p. 183; that is, "where they become members of a corporation for definite purposes specified in their charter, and for a time settled by it." The case of *Natusch v. Irving*, cited in *Kean v. Johnston*, does not support the position. The complainant there held a life policy in a life insurance company, by which he became a member. This was a contract that the company should continue until his death. Lord Eldon held that they could not add marine insurance to the business against his will, while the partnership continued, nor compel him to retire by indemnifying him, or by valuing his policy and paying it off. Nor does the opinion of Chancellor Kent, in *Livingston v. Lynch*, 4 *Johns. Ch.* 573, sustain it. There the partnership was stipulated to continue as long as Fulton's exclusive right continued; and it was held that a majority could not change the essential provisions of the articles of partnership. Angell and Ames, in the section referred to, and Binney's case, 2 *Bland's Ch.* 142, simply state that there is little doubt that a court of equity, in a proper case made, would restrain the disposition of the property of a corporation for other than corporate purposes. This refers to a disposition of the whole property during the continuance of a corporation, and not to an abandonment of the enterprise by the

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vote of the majority. The reasoning of all these authorities is based upon the law of partnership. By that law, when there is no definite time fixed for the duration of a partnership, it is a partnership at will, and may be ended by any partner at his will. *Story on Part.*, §§ 269, 270; *Coll. on Part.* (2d ed.), B. 2, ch. 2, § 2. And this was the doctrine of the civil law. *Pothier on Part.*, Lib. 17, tit. 2, n. 64; 1 *Domat's Civil Law*, §§ 802, 803.

Becoming incorporated for a specified object, without any specified time for the continuance of the business, is no contract to continue it forever, any more than articles of partnership without stipulation as to time. There is no reason why it should be construed into such a contract; such is not implied by the charter. And a doctrine that all the stockholders but one may be compelled to continue a business which they find undesirable and unprofitable, and wish to abandon, is so unreasonable and unjust that it will not be held to arise by implication, unless that implication is a necessary one.

The Supreme Court of Pennsylvania held, in *Lauman v. The Lebanon Valley R. Co.*, 6 Casey 42, that private corporations can, by a vote of the majority, abandon their enterprise and sell their property, and that such sale violates no contract. In their opinion they say: "If there is anything in the relation existing between the corporation and its members that prevents a sale, then a more serious difficulty is presented. For if there is, it must be a part of the contract of the association, and cannot be changed by the legislature. But is there? The charter contains the terms of the contract, and in it we discover no provision of this kind. Can we regard it as implied or involved in the nature of such a contract? We do not think so; for property in itself is essentially alienable, and the right of alienation is essential to complete ownership." The court further hold, that a dissenting stockholder can not be forced into a new enterprise, or to take, as compensation for his shares, stock in a new company, or a company into which the old one is consolida-

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ted. They hold that there are two contracts: one with the legislature, which it can dispense with; the other between the stockholders, as to what object they will enter into, and that this cannot be altered by the legislature. They say: "It is the nature of his contract with his associates, by which, under legislative authority, they constituted themselves into a corporation; that it is dissoluble, and that, upon its dissolution, the rights and property shall be distributed among the members." And again: "A railway corporation may, by legislative consent, abandon its franchises as conservators of a highway."

In that case the legislature had omitted to provide any compensation for shareholders, except the stock of the new company, supposing the change so beneficial that none would dissent. Yet the court held that the change might be made by the directors, upon giving security to dissenting stockholders to pay them the value of their stock, to be appraised by commissioners. In that conclusion I do not concur.

In *Gratz v. Penn. R. Co. and Phila. & Erie R. Co.*, 5 *Wright* 447, in the same court, the complainant, who was a stockholder in both companies, applied for an injunction against the lease of the road and franchises of one company to the other, for nine hundred and ninety-nine years, a lease authorized by the legislature. The court held that both corporations had the power, without the consent of all the stockholders.

In *The Commonwealth v. Atlantic & Great Western R. Co.*, 3 *P. F. Smith* (53 *Penn. R.*) 9, on an information by the Attorney-General in nature of *quo warranto*, the same court held that a corporation created by consolidating two corporations of New York with one of Ohio and one of Pennsylvania into a new corporation, with the consent of two-thirds of the stockholders of each, according to the provisions of a statute of Pennsylvania, constituted a lawful corporation.

In *Treadwell v. Salisbury Man. Co.*, 7 *Gray* 393, it was held by the Supreme Court of Massachusetts, that a private

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incorporation, by a vote of the majority, may abandon the business of the corporation and sell out their property. The doubt expressed, whether a corporation for a quasi public purpose could do this, and whether the state, by mandamus, could not compel them to continue their business, does not apply to a case where a state has authorized it.

Such a radical change as the abandonment of business cannot generally be effected by directors; their duty in most charters is to manage and conduct the business. It requires the action of the corporators themselves. In corporations where there is no provision to the contrary in the charter, the rule is that the majority governs. The assent of all is therefore not required. *Grant on Corp.* 68; *A. & A.*, § 499.

The legislature as sovereign, can prescribe laws which shall govern corporations where there is no contract in their charters to exempt them. It can direct that a majority of members, or two-thirds in interest, shall control. If it can do this by general law, it can by special act. The act of 1870 does that in this case.

But, because the corporators may, with the consent of the state, by the vote of a majority or two-thirds in interest, abandon their enterprise, sell out their property, and return his share of the proceeds to each stockholder, it does not follow that by the same authority the works may be leased to be carried on and conducted by others, the corporation continuing to exist. The right to elect the directors by whom the business is to be managed, is a provision in the charter which the state or a majority cannot interfere with; it is a contract.

The true question on that point here is, whether the making of this lease and contract is an exercise of the power of managing the business and concerns of the corporation conferred in the charter, such as can be used by consent of the legal majority of corporators, without that of all.

Such directors have power to make contracts binding beyond their term of office, power to commute fares, and to do

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so for a fixed period; it is a power constantly exercised. They contract with express companies and other railroads for the use of their roads, for a term of years, at a stipulated price. Such contracts are universally admitted to be valid, if permitted by the state. These roads are public highways, on which any citizen or corporation of Pennsylvania has a right to travel and run trains. The state cannot prohibit this, as long as they are public highways; much less can the defendants. There is no reason why the directors should not make a contract with any one, for a term of years, that he might have the use of these roads for a stipulated price; nor why part of that price should not be the keeping the works in repair, and paying all dues and taxes. I see no reason why directors, the officers who are authorized by the charter to conduct the whole business and manage the affairs of the corporation should not exercise that power by leasing the works to others, obligated properly to perform all the duties of the corporation, in a manner stipulated in the contract, and for such rent or consideration as in their judgment will be as beneficial to the corporators as operating and maintaining the road themselves, or more so. This authority as to the stockholders, must be founded on the provisions of the charter, and not upon a special authority from the state, which is required only to bind the state. No court of law in this state, or in any other state, so far as I know, has determined that the directors have not such power, if exercised with the consent of a majority of the stockholders. It has never been held that there is an implied contract in the charters, that the directors of such corporation shall not exercise their power in this manner. On the other hand, it has been held that a legislature, clothed with the power of making and changing the laws, clearly including the power and duty to levy taxes and provide highways, may, by stipulations in charter and other laws, deprive themselves and their successors of the power of levying taxes on any portion of property in the state, and of making roads in any part, and of course in the whole of its territory; and

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this must now be regarded as law until wiser counsels still cherished prevail; *Washington University v. Rouse*, 8 Wallace 441; and this, under constitutions which provide that the law making power shall be vested in representatives elected yearly by the people. If this can be done, much more may the directors of a corporation so exercise their powers, especially by the actual consent of a majority of the corporators, which in that case is equivalent to a change of constitution in a state by a majority of the whole people. Whatever view may be taken at law, such power seems equitable, as the owners of two-thirds of the stock have power, by contracts for proxies or other means, to pledge their stock to vote for directors who would, from year to year, renew and continue such contracts.

Over much, if not the most of the property to be transferred by this lease, the directors have absolute control. They can dispose of it without the consent of the state or the stockholders. Of this class are the lands and real estate held, not needed for sustaining their proper works; all moneys and securities for moneys invested; all shares of stock in other corporations, and all leases of other works or roads. It has been questioned, whether the defendants had power to take or hold such stocks or leases, even with consent of the state, and whether all these acquisitions were not *ultra vires*. But the charter of each of these corporations gives absolute power of "purchasing, holding, and conveying real and personal estate," without limitation; and to make it stronger, if that is possible, in the New Jersey charter the words are "*any* real or personal estate." In each case the last clause of the section grants all rights and powers pertaining to corporate bodies, necessary for the purposes of the act. This limitation cannot be annexed to the right of holding property, because the two clauses are separated by other provisions of a different character, and the annexing the qualifications to one power, and not to the other, seems to indicate the intention to grant the one as it reads, without the limitation. "*Expressio unius est exclu-*

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sio alterius." I know that it has been held in many cases that the power conferred on corporations to hold property, is confined to such property as is necessary or convenient for the purpose of the charter; yet these decisions, I apprehend, will be found to be made upon charters containing that limitation, although the dictum of Potts, J., in *The State v. Mansfield*, 3 Zab. 510, would seem to apply that construction to these charters. But even if that limitation must be applied by construction to the express words of those charters, yet the application of the principle by the decision in *The State v. Mansfield*, is that the authority to hold extends to all property that it may be expedient or convenient to hold, the better to effect the purposes of the charter; such as dwelling-houses for employees; though these were not adjudged to be free from taxation, like houses for lock-tenders, car and repair shops which were necessary or proper for maintaining and operating the roads and canal. This construction would include the stock in the Belvidere and other tributary roads, and even the stock of the Jersey Associates, necessary to obtain the ferry privileges so important to the profitable operation of the New Jersey road. Unlimited powers of holding any real or personal estate, would in all cases authorize the directors to purchase and hold such property, when bought in good faith to promote and further the objects of the corporation, even without the consent of the stockholders. But all such property not expressly authorized to be held by the charter, or necessary for its proper objects, the directors may dispose of by sale or lease, or in any manner, at their discretion, without the consent of either the stockholders or the state. They may also thus dispose of any cars, locomotives, steamboats, or fuel provided expressly for their works. They may sell or dispose of their wharves and ferry landings in New York or Philadelphia, and purchase others, or may discontinue any ferry. They may, and constantly do, lease parts of these, and of their other real estate not needed for present use. They may take up and discontinue any side track or stations

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that are useless. The New Jersey Company took up the third rail, laid on each track to enable the cars of the Erie Railroad to reach the Jersey City Ferry. It sold its branch railroad and bridge at Newark, and the right to occupy part of its road bed, to the Hoboken Company. These sales and changes were made without the consent of the legislature or the stockholders, and were within the corporate powers. The directors could abandon and take up the second track on the whole route, and sell the rails, if it became useless and a source of loss by decrease of business. They can discontinue any train or trains, and any stations, except such as they are bound by their charter, or by contract, to continue.

It may be a serious question whether either of the defendants is bound, by its original charter, either to the state or its stockholders, to operate its road. The Canal Company is neither bound nor authorized by its charter, expressly or by possible implication, to run boats on its canal. The Camden and Amboy Company is neither bound nor expressly authorized by its charter to run trains on its road. And by the rules of strict construction insisted upon by the counsel of complainants, authority to run trains cannot be sustained by implication. The implication is very slight. It cannot be had from the power to construct and maintain the railroad, any more than the franchise of being a transportation company could be implied to be granted to any turnpike or plank road company. The word "transportation" in the name does not imply it, because on the water they were made a transportation company by express enactment. On land a railroad, and on water a transportation company—the name was apt. The eleventh section, which states the object and confers the power, confers power only to construct the road, not to operate it. The sixteenth section, which provides for tolls and charges for transportation, will be satisfied by tolls on land and transportation on water. And the part that speaks of its *use* of the road does not necessarily imply the use by running trains, but is satisfied by its being kept in

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repair and *used* for earning tolls. The eighteenth section, providing against injury to its works, *carriages* and *machines*, raises the very slight implication, which may be drawn from the fact that it was contemplated that it might for some purpose own carriages and machines. Certainly no authority is here given to run trains, either expressly or by necessary implication, which is insisted on by the complainants as necessary to confer it. And the presumption against the implication seems strengthened by the fact that, in three railroad charters granted in 1831, viz.: 'The Paterson and Hudson River Road' (*P. L.* 24), 'The Paterson Junction Road' (*P. L.* 66), and 'The Elizabethtown and Somerville Road' (*P. L.* 80); and in three charters granted in 1832, viz.: 'The New Jersey Road' (*P. L.* 96), 'The Paterson and Fort Lee Road' (*P. L.* 121), and 'The New Jersey, Hudson and Delaware Road' (*P. L.* 133); express authority was given to operate the roads with locomotives and cars, to charge one rate for tolls, and another for transportation in the cars of the company.

In 1815, a charter was granted to the New Jersey Railroad Company to construct a railroad from the Delaware to the Raritan, with a capital of \$500,000. This, with the steam navigation on the Delaware and Raritan, had it been constructed by the parties interested, would have furnished a direct and expeditious route of communication from Philadelphia to New York, and of transit over this state from all parts of the Union. It was, so far as I have been able to ascertain, the first railroad charter granted in America; and it shows that New Jersey has always been foremost in works of public improvement, and willing not only to permit, but to provide for the passage of all across her territory. This act provided, in its tenth section, for rates and charges for transportation of merchandise and produce, and tolls for all persons using or traveling on the road; but no other or express power for running trains was given. The implication is a little stronger in this than the other; yet either act may be read and fairly con-

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strued, as merely authorizing the construction of a road to be used by the public with their own carriages, horses, and motive power, like a turnpike or plank road.

Yet no one can doubt that in both these cases, both the legislature and the corporators supposed that the right to operate these roads was granted by these charters. The first charter was granted at the session of the legislature next after George Stephenson, in 1814, placed his first locomotive on the Killingworth Railroad, and succeeded by surface traction in drawing a load of fourteen tons, six miles per hour. The other was granted at the session next after his famous engine, the Rocket, the father and prototype of our present improved locomotives, was put in successful operation, at the opening of the Liverpool and Manchester Railroad, in 1829. It had attained its fastest speed of twenty-nine miles unloaded, and, with a load of fifty tons, fourteen miles an hour. These roads were both projected, at least in part, for locomotives, and probably the projectors intended that these engines should be run by the corporations.

But although thus the conclusion may be arrived at with some difficulty, that this corporation was authorized by the charter to equip and operate its road, there clearly is not, either by express enactment or implication, any obligation to the state, or contract with its stockholders, to do this; and that contract, and not the power to do it, is the question now under consideration.

In the charter of the New Jersey Railroad Company, there is clear and express power to equip, and implied power to operate the road, granted in the sixteenth section. But neither this section nor any other part of the charter makes it obligatory. It is compelled to construct and maintain the road under pain of forfeiture of the charter. This act declares the road a public highway, and provides for the use by the public, limits the tolls to be charged, and directs toll boards to be put up at the toll gates. The duty of the company to the public would be fulfilled by constructing and maintaining the road. This power, like the power to

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construct branches, to erect dams and dykes, and every other mere power granted by the words "it may be lawful" or "it shall have power," may be exercised or not at the discretion of the directors. If such a corporation provided omnibuses, waiting rooms, and lunch rooms for the accommodation of travelers, or baggage wagons, trucks, and store rooms for baggage and freight, which they have power by implication to do, they can change or abolish them at pleasure if they become unnecessary, or the directors are of opinion that these conveniences will be better furnished by others. The directors of these companies have power to discontinue any train, or half the number of trains run, and to reduce the fares and rates of freight, although in the opinion of the stockholders, and in fact, these changes may be injurious to the interests of the company. The stockholders have no right to require the directors to exercise to its fullest extent, or at all, any discretionary power conferred by the charter.

If these principles are correct, the defendants by their directors have the power to discontinue operating the roads, and to sell or dispose of all their equipment or plant. And the only question that remains is, whether they can by lease delegate the power and duty to keep the road in repair, with the right to operate it, to another corporation, for a consideration which, in their opinion, is adequate and beneficial to the stockholders. I am of opinion, for the reasons above stated, that they have such power.

As before observed, there is no decision against such power to lease; and there are many instances in this state, in which such leases have been made and approved by the legislature. They have been made by corporations, the management of whose affairs was, by the charter, entrusted to directors elected from year to year, as in this case. The Paterson and the Ramapo Roads were both thus leased to the New York and Erie Company. The Warren Railroad and the Morris and Essex Railroad, were both thus leased to the Delaware, Lackawanna and Western Railroad Company.

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The Morris Canal to the Lehigh Valley Railroad. The Pemberton and Hightstown Railroad and the Camden and Burlington Railroad were severally leased to the Joint Companies. None of these leases received the assent of all the stockholders, and they were all authorized or sanctioned by the legislature without such assent. These leases were unquestionably made with the advice of the most eminent counsel in the state, and their validity has never been questioned by any one in the courts. This sanction would not settle the law; but they are both matters of great weight, and to be regarded in considering the question; especially in a court of equity, on a motion for preliminary injunction, where the question is, as this, merely a question of law, and has never been settled by the law courts, and the right to the relief depends upon it.

But if I am right in the conclusion arrived at above, that the majority of corporators under a charter which specifies no definite time for its continuance, have a right to abandon the undertaking, and dispose of and divide the property, the proceeding in this case is valid as against the complainants as a lawful way of accomplishing that end as to them. Two-thirds of these corporators have determined that they do not desire to go on with these enterprises, under the charters, and that they wish to abandon them, and are willing to accept as their share of the corporate property a yearly rent or annuity secured by a provision like that contained in this proposed lease. Some stockholders are not willing; and although the majority can effect the abandonment, they can not compel the dissentients to accept like compensation for their stock; it might be compelling them to embark their capital in a new enterprise. Provision is therefore made to pay or return to them the full value of their share of the whole property of the corporation. This is all they would have if the works were sold out. The provision is a most equitable one, and without it the transaction, even if valid and legal, would not be equitable and just.

In arriving at this conclusion, I do not change or modify

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any of the positions laid down in the case of *Zabriskie v Hackensack and New York Railroad*, except so far as the correction of an inadvertent expression heretofore noticed is concerned; on the contrary, I re-affirm them all, as founded upon established principles that cannot be changed consistently with good faith and justice. Capital contributed for one purpose, under a charter declaring that purpose, can never be applied to one substantially different without consent. I hold that a charter which declared that the undertaking should be prosecuted for a definite time, is a contract for that time, and binds all to continue it; but that, on the other hand, a charter that states no such definite time, like a partnership made in that manner, can be abandoned by a majority; that there is no contract which prevents it; that the will of the majority, which is the law of corporations, must govern. And if there were no such law, that, like any other law, may at any time be enacted by the legislature, who may declare that a majority, or two-thirds, of the stock, or of the corporators, shall govern. Of course such law would not affect corporations with irrevocable charters declaring a different rule.

Again, the defendants contend that the lease, and the act authorizing it, must be sustained, on the ground that this property is taken for public use, and that compensation is provided. The complainants deny that this is taken for a public use, and argue that the act provides for compensation only after the taking, and is therefore void by the Constitution of the state.

The properties of a corporation, such as bridges, turnpike and rail roads, and its franchises, are property, and as such are subject to the power of eminent domain, and may be taken, upon compensation, for public use. Any other corporation could be thus authorized to take the whole or any part of the roads of the defendants. Highways, whether by railroad, canal, turnpike roads, or common roads, are for the public use. It is one of the functions and duties of government to provide them. This is a duty recognized in all civi-

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lized nations from time immemorial. The absolute duty is only to the subjects or citizens of the nation or state. But among modern nations, by comity, neighboring countries are permitted to use their highways; and railroads and other highways are often constructed to accommodate the inhabitants of such countries in passing to and through them. These roads are built by the sovereign power, and for a public use. And in these United States, bound together in one country, with many common interests, and in which the citizens of many states can only reach other states, or the seaboard, the harbors, and marts of commerce, by crossing intervening states, the construction of highways for such purpose, although only required by comity, is for a public use. The law, unquestionably, is as laid down by Chief Justice Beasley with so much clearness in the case of *The Delaware and Raritan Canal Co. v. The Raritan and Delaware Bay R. Co.*, 3 C. E. Green 561—that “one state cannot, as of right, demand that a certain mode of passage shall be provided for her citizens and their property by any other state.” Yet, as the Federal Government has not been empowered, and has not yet assumed the power, to construct railroads through states, it seems almost a moral duty, or imperfect obligation upon each state, especially one situate as this state is, to provide for passage across it by citizens of sister states. If the state chooses to do this, it may; but it is an act done in its sovereign capacity, and the property taken for it is taken for public use. The Camden and Amboy Railroad was constructed across the state for that purpose, and that only. Its termini were the cities of New York and Philadelphia. The second section of the charter declares its purpose, which was to “perfect a complete line of communication from New York to Philadelphia.” It is obliged to provide steamboats at either extremity of the road, to transport passengers and goods from city to city, but not for local passengers or freight. It was not obliged to have depots, or to stop for passengers or freight at any point in the state; and while the railroad was declared a public

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road for all who could get their carriages upon it, there was no obligation to provide switches or turnouts anywhere along the line for the accommodation of Jerseymen. Pennsylvania, by an act of February 16th, 1841, provided that the New York and Erie Railroad might pass for about fifteen miles through the northeast corner of the state, and might take land by power of eminent domain. New York authorized the Morris Canal Company, a corporation whose works were wholly in this state, to condemn lands in that state for a reservoir for a feeder for the canal, and it was sanctioned as a proper exercise of eminent domain. *Morris Canal Co. v. Townsend*, 24 Barb. 658. This state, by the act of February 21st, 1856, (*P. L.* 42,) authorized the New York and Erie Railroad Company, a foreign corporation, whose business was to convey passengers and freight from Dunkirk and other parts of New York, to New York City, to proceed in their own name to construct a railroad from the Paterson Railroad to a point opposite New York City. The act gave power to condemn lands, which was acted on, as appears by the case of *Ross v. Adams*, 4 Dutcher 160, and 1 Vroom 505, where the dispute was concerning funds in court, the proceeds of lands so condemned. The State of New York authorized the New York and New Haven Railroad Company to extend its road through that state, and take lands by condemnation. But, in the present case, the public use does not depend on this alone. The object of consolidating the business of these companies is to facilitate and improve communication all along their line. The large business and manufacturing cities of New Jersey are upon the route of the United Companies. Many of these cities constantly receive and send goods and passengers from and to places in the interior of Pennsylvania, Ohio, Illinois and other western states. If the communication is really improved, which is the object and intent of giving this power, it is a public benefit to the citizens of this state in providing a more convenient highway for their intercourse with the western part of our own country. Taking the roads of these companies

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for this purpose, is clearly taking them for public use, and for the use of the citizens of this state; it is simply furnishing the proportion of this state for the highway that will be provided by this union of companies, or one consolidated company, from the Pacific to the Atlantic, for the common use of all the citizens of the nation, including those of New Jersey.

If the defendants and all their stockholders had refused consent, the state could still have authorized the taking of these roads for the purpose contemplated, by condemnation. But the act of 1870, did not provide for this. Its intention was only to allow these roads to be taken, if two-thirds of the stockholders should consent. In that case the act intended that the stock or interest of the others who did not consent, should be taken by condemnation. It is only when no bargain can be made with the owner, that the power to condemn is usually given. And if the owner of an undivided share, or an estate for years, for life, or in reversion, in lands required, consents, his estate need not be condemned, but only the estate of those who did not agree to sell. It is fair and equitable that such stockholders as prefer to take the arrangement made by their directors for them, a perpetual annuity of ten per cent. on the par value of their stock, to receiving its actual value as represented by the property, should be permitted to accept such compensation; they could not be compelled to take it; and that the others should receive what the law requires in all cases of condemnation, the money value of their property as compensation. The objection that, in this case, the defendants and not the legislature, determine that the case is a proper one for the exercise of the power of eminent domain, is not founded in fact. There are only a few companies in the state, and a few out of the state, whose works connect with those of the defendants. The legislature have determined that consolidating business with either or all of these, is for public use, and a proper occasion for the exercise of this power.

But the statute only provides for compensation *after* the

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road is taken. The Constitution, Article IV, Section 7, ¶ 9, provides that "private corporations shall not be authorized to take private property for public use, without just compensation *first made*." A provision like that in this act was inserted in the act consolidating the United Companies, and in several other statutes of this state, enacted since the present Constitution, authorizing like changes. Thus sanctioned by legislative approval, and that of the counsel under whose advice these important transfers have been made, it would seem presumption to treat it as invalid and of no effect, even if that was my opinion.

But it seems to me that the taking intended to be prohibited by the Constitution, is an illegal or forcible taking possession, without the consent of the owner. It does not prohibit receiving or accepting, by consent of the owner, when the compensation is to be settled afterwards. Any one in lawful possession, or having the legal authority to do it, may give possession before compensation. If a tenant for life or years, gives possession of the land, and consents to its use, a railroad company may enter under him, and this would not be taking the property of the reversioner. His estate may be taken and condemned, when the reversion falls in; compensation to him must be made then before his estate is taken. The directors of these defendants are in the possession and control of these roads. The roads are not in the possession of the complainants. The corporation, not the complainants, have the title; the stockholders have neither the legal nor equitable title, nor the right to the possession. At the lease, the directors will *give* up the possession of the property. It will not be *taken* from them. But on the hypothesis that they have not the right to do this as against the complainants, the complainants will have the right to call them to an account in equity, as their *cestuis que trust*, and to compel the lessee to surrender the lease, as obtained by a breach of trust in which it was an abettor, and to compel the directors to account for the profits which would have accrued, but for the breach of trust. Their property in the stock is not taken, impaired, or affected by

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the lease. They can, after it, proceed for any redress to which they were entitled before it. But upon the proceedings prescribed by the act for condemnation being had, and after compensation paid, the stock which was their property is taken, and their right to any other redress is gone. Thus the compensation is first paid before this property is taken.

Here are unsettled questions of constitutional law, proper for the courts of law to determine. Upon them rests the right to this injunction. Were my leaning the other way, it would be against the settled rule of equity to grant an injunction upon a doubtful right, where the injury by arresting, and possibly defeating a negotiation like this, might be so great and irreparable; especially in a case where only a little more than one-sixtieth of the stockholders apply, and the rest by their silence acquiesce in, or by their written consents approve of the proposed contract, and where the act provides for compensation to be made by their own trustees, upon a simple notice that they demand it. The object of courts of equity in interfering where property is taken contrary to the constitutional provision is, to save citizens whose property is taken, from the expense and trouble of pursuing at law, strangers who, without legal right, take their lands. Here it is a claim against their partners or trustees. Equity does not relieve by injunction in all cases of violation of constitutional provisions. The Supreme Court of Pennsylvania, in *Mott v. Pennsylvania R. Co.*, 6 *Casey* 23, refused unanimously, a preliminary injunction on this ground, to a stockholder who was offered compensation by the act, and held that his rights were to be determined on the final hearing.

Another question is, as to the power of the corporation lessee to enter into the proposed contract; whether they can bind themselves to it, or whether it is not *ultra vires*, and therefore all their undertakings void. The position of the defendants' counsel, that this is only a question between it and the state that created it, to be raised by its officers, and in which the complainants have no concern, is not

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sound. If these directors deliver to the lessee all this property, and these valuable assets, some of which to the amount of millions it may take away and convert to its own use, without being liable on its obligations, this would be such faithless and improvident waste, and squandering of the assets of these corporations and corporators, as would entitle them to the preventive protection of a court of equity.

That a foreign corporation may own property in this state, and transact business, and make contracts in it to be performed here, is too well settled to discuss. There is no law of this state prohibiting it. The capacity of such foreign corporation to hold property, or transact business, depends upon the law of the state which created it. If that gives it power to own, lease, or use property in another state, it has that capacity. The Pennsylvania acts of February 17th, 1870, and May 3d, 1871, set forth by the answer, unquestionably give this authority. This allows of no discussion, and was frankly admitted by the distinguished counsel who closed the argument for the complainants; he only excepted from it the personal property and stocks in other companies, whose railroads do not connect. But that restriction is only as to the roads embraced in the lease—it gives authority to enter into *any other contract with* companies owning connecting roads. This surely will include power to take with such railroads leased, all property which the lessors hold for the furtherance of the objects of the leased road as appurtenant to it. Charters and statutes of a foreign state must be construed here as by the courts of that state. *Amer. Print Works v. Lawrence*, 3 Zab. 590. And it was held in the Supreme Court of Pennsylvania, in *The Phila. & Erie R. Co. v. The Catawissa R. Co.*, 53 Penn. R. 20, that a statute authorizing the lease of one railroad by another company, authorises it to lease another railroad leased to the lessor as *appurtenant* to its road. And many decisions of that court, besides that in Gratz's case, hold leases and purchases made by this lessee, without the consent

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of all the stockholders, to be valid. And by statute (*Nix. Dig.* 915, § 34), the printed reports of the decisions in other states are evidence.

The conclusions thus arrived at are these :

1. That the act of 1870 gives authority to the United Companies to lease to a corporation of another state.

2. That their works form both connected and continuous lines with the works of the proposed lessee.

3. That the directors of these companies have power to sell or otherwise dispose of all the property of the companies, except the roads and canal, and the franchises granted, without the consent of the state, or of all the stockholders.

4. That they have power, by consent of the state, and of a majority of the stockholders, or of any other proportion required by law, to sell, or lease, or otherwise dispose of these works, or to abandon them.

5. That a lease made by virtue of such authority is within the power delegated to the directors, and that there is in their charters no express or implied contract violated by it, and, therefore, the act authorizing it is not unconstitutional.

6. That the purpose for which these works are leased, the benefit and advantage of extended public highways, controlled and operated by one head, for regular and easy communication from and through New Jersey with other states, is evidently a public use for which property may be taken on compensation.

7. That, even if the directors have not power to lease for a term so as to bind the stockholders or their successors, the leasing and delivering the works to the lessee, with a stipulation and obligation to have the shares of dissenting stockholders valued and paid for, is not taking property without first making compensation.

8. That the Pennsylvania Railroad Company, the proposed lessee, has by its charter and supplements, and the public laws of Pennsylvania, as construed by the courts of

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that state, power to take this lease, and bind itself to all its stipulations.

There are many other reasons against making this lease, urged by counsel with great power and eloquence, which are not proper subjects for judicial consideration or action, but for that of legislators, and the companies or their stockholders. Such are: state policy and pride, which should not allow these works to be under the control of non-residents, or of a foreign corporation. The inexpediency of permitting an overgrown, gigantic corporation, like another Colossus, to place one foot on our shore, with the other, perhaps, on the Pacific. That this lease of nine hundred and ninety-nine years may impair or destroy the right of the state to take these works at cost in 1889. And that our citizens may be put to great inconvenience in being compelled to resort to courts of other states for redress of injuries suffered in this. These matters are proper subjects for the consideration of the legislature only; that has considered and decided. Its action in this case has been in accordance with the policy of the state for years, which has been to permit corporations of other states to lease works in this, and to construct new ones for themselves, under the impression that the expenditure of large sums of money on these works, and the increase of business which they bring here, are a great advantage to the state, the works themselves being constructed and operated by authority of, and subject to the laws of this state. This general policy I have no power or inclination to overrule. I need not say whether in this case I think it wisely exercised. Neither is the policy or wisdom of the surrender by the state of its right to take these roads in 1889, at cost, for my consideration. If they were, I cannot comprehend how a permission to the defendants to connect or consolidate their own business by contract, lease or otherwise, could confer power to affect the rights of the state, even without the clear and distinct reservation of these rights contained in this act. This result could not be reached by the most

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liberal and latitudinarian construction, much less by the rules of strict construction which most clearly apply. Had the state expressly authorized a lease of all the works for nine hundred and ninety-nine years, the question would have been different.

The question whether the rent in this case is sufficient, and whether greater should not have been required to be paid, is exclusively for the determination of the directors, and such stockholders as agree to receive it for their stock. The sufficiency of the security—the mere undertaking of the lessee—with the right of re-entry, is for like determination. For property and assets of this amount entrusted to the directors of any corporation, it is not usual to require sureties; they could hardly be obtained. As the charters now stand, the persons who control the corporation lessee, by purchasing a bare majority of the stock of the New Jersey corporations, or by the vote of the two-thirds who assent, could be elected directors, and without sureties obtain control of the alleged fifteen millions of cash and convertible assets, and appropriate or squander them beyond control of any of those who dissent.

Had my views of the questions above considered been different, my determination of this application must have been the same. It has for a long time been the established rule in courts of equity, in matters of preliminary injunction, that where the right of the complainants, to which the alleged injury is threatened, has never been established at law, and is not to the equity judge clear and free from serious doubt, an injunction will not be granted, but the party will be left to his remedy at law. In some cases where the leaning of the judge is in favor of the right, and the intended injury is great, and if once done can never be fully remedied, the judge in his discretion will, by injunction, retain matters *in statu quo* until the hearing of the cause, or a decision at law. Here the right on which the application is based, the right of a minority of stockholders, down to the owner of a single share, to prevent all the others from making what

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to them seems an advantageous disposition of their property, has never been established at law. And were my views in favor of that right, the injury to result from a temporary violation of that right, if the lease should be declared void in the end, is not so great or irreparable as to justify the exercise of that discretion in a case where it would seem so inequitable, where less than one-fiftieth of the stockholders claim to control all the others, and where full compensation is provided. If the interference of this court should defeat the proposed arrangement, as it might, the loss of a bargain which they think very advantageous, to the stockholders who consent, would, from the extent of their interest, be far greater than that of the complainants by the refusal to enjoin.

This restriction on their action, adopted by courts of equity, has been somewhat extended and definitely settled as the law in this state, by the Court of Appeals, by the judgment in the case of *The Morris & Essex R. Co. v. Prudden*, 5 C. E. Green 530. The Chancellor in that case had assumed that Prudden, by the purchase of a lot fronting on a street laid down on a map and staked out on the ground, from the owner of the tract so mapped and laid out, was entitled to have the street kept open to its full width, and that the subsequent laying out of a public highway over this street, and its vacation, both by surveyors of the highways, without compensation, did not affect the right of way. These questions the court held were proper to be determined by the courts of law, and that an injunction ought not to issue, except in a strong and mischievous case of pressing necessity, without the right having been previously established at law. And while the opinion in that case admits that the law as to the right of way had been so established in other States, and cites a number of cases to show it, the decision of the Chancellor is reversed for this, among other causes, and very consistently, without deigning to review the correctness of his conclusion, although the inference is hardly questionable that the court agreed with him in it. This judgment is direct authority for the position that the right of the com-

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plainant which he seeks to protect, or the principle of law on which it depends, must have been settled by the courts of law of this state, or the decision of the court of equity, even if correct, will be reversed.

There has been no decision on the right of the complainants to prevent a sale or lease of these works, by any court of law in this state. None is pretended. The only decision relied on is that of the learned Master who advised the Chancellor in *Kean v. Johnston*. In the first place, this is only a dictum, a dictum founded on no precedent, and followed by no court; the case was expressly decided on other grounds. But the Master, whatever his standing and authority as a lawyer, was sitting in a court of equity, and not in a court of law, and, therefore, the authority is not sufficient. This is not only to be inferred from the language of the opinion in *Prudden's case*, but from the case itself. The Chancellor, in his opinion, relied upon and cited the decision of the Court of Appeals, in the case of *Holmes v. Jersey City*, 1 *Beas.* 299. In that case Holmes had purchased of Van Vorst a lot laid out on his map, under the same circumstances precisely as *Prudden's* purchase. The question was upon the right of the city to close part of the street. In the opinion of the Court of Appeals, delivered by Chief Justice Green, the proposition is stated at the commencement, as the foundation of the claim, "that the complainant, who had purchased under Van Vorst, is entitled to the use of the entire street as dedicated." This proposition was at the foundation of the claim of Holmes; without it he had no standing in court. To this proposition the whole court assented, both by adopting the opinion, and by reversing the decree of the Chancellor, who did not, perhaps, differ from them on this point; but his order dissolving the injunction was correct, if Holmes had not this right. Six judges of the Supreme Court, and five judges of the Court of Appeals, also law judges, concurred in this judgment. But they were sitting, not as a court of law, but as a court of equity, on an appeal from the Chancellor, and therefore it is properly

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assumed, in Prudden's case, that this question had not been determined by a court of law. This must have been the main question, as the other, whether the right was lost by laying out and vacating a highway over the lands in which the easement was, is included in that so often declared by the courts of law, that the vacation of a highway laid out over lands, leaves the title as it was before the laying out. But both questions are included in the opinion in Prudden's case. The opinion of a Master sitting in equity, could not affect what was not done by the unanimous opinion of a court composed of all the law judges, because sitting in equity. This doctrine has been, since that decision, followed by this court in many cases, including that of *The Hackensack Improvement Commission v. The N. J. Midland Railway Co.*, ante p. 94.

The doctrine of acquiescence, too, as laid down and applied in Prudden's case, must deprive the complainants of the remedy by preliminary injunction. In that case the road had been located, and a track laid in 1846 and 1847, after Prudden's purchase on the street in front of his lot, but on the side most distant from his lot. At the laying of the first track, there was nothing to intimate to Prudden that a second track would ever be required, or that the right to lay it was claimed. His only acquiescence was silence. In June, 1848, the highway was vacated by surveyors, and in December, 1848, the owners who laid out the street and sold to Prudden, conveyed to the railroad company a strip in the street fifty feet wide. These facts appear in the opinion, and the judgment is founded on them. The court held that this acquiescence in laying the first track, deprived him of the right to the protection of an injunction, when the same company attempted to lay another track on the same street, nearer to his lot, that seriously incommoded the access to it over the street. The doctrine of acquiescence had not before been extended, even in injunction cases, beyond the thing or erection acquiesced in, and was not held to protect further

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encroachments of a like nature upon other parts of the same property.

In this case the delay of the complainants in filing their bill until the terms of the contract were fully agreed upon, cannot be held to be acquiescence. Until they knew the terms, they could not know that they were not such as might induce them to acquiesce or consent, even if they were not bound. But the acquiescence is their consenting to, or acquiescing in former encroachments of the same nature, on these very rights, by the legislature and their directors. For the gist of the decision in Prudden's case is, that it need not be an acquiescence in the injury then contemplated, but in a former one touching the same right. Prudden had never for a moment acquiesced in the laying of the second track; he filed his bill before any work was done. These complainants are in precisely the same situation. Some of them acquiesced in the act of 1831, consolidating the Joint Companies; all, as expressly alleged in the bill, assented to, or acquiesced in the act consolidating the United Companies, and the agreement which it confirmed. These matters were, according to the Hackensack and New York Railroad case, greater encroachments on these rights of stockholders than the present lease.

✓ The doctrine of acquiescence settled in Prudden's case, must be applied as it was then applied, only to affect the remedy by injunction. For that purpose, though novel, it may seem equitable. It will never answer, nor was it intended, to apply it, to affect or change rights of property, or to claims in the courts of law; else, the owner of a lot with a house removed from the front, if he suffered his neighbor to erect a building encroaching on the lot a few feet or a few inches, would be bound by this, if that neighbor twenty years afterwards should erect a wing to this building, extending across the lot and cutting off access from the house to the street. But such acquiescence must in this case as in that, deprive the complainant of his remedy

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by injunction. That decision is the law of this court until reversed or modified.

These views make it unnecessary for me to consider other questions presented, including that of want of necessary parties to the suit, so ably urged by the counsel who opened the argument for the defendants.

The injunction must be denied, and the order restraining the defendants from executing the lease vacated.

I have arrived at the above conclusion after careful investigation and deliberate reflection. The case itself is of great importance; the principles involved are still more important. I have been much aided by the able and exhaustive arguments of the distinguished counsel concerned in it; their briefs, especially the full and elaborate brief of the opening counsel, containing a summary of the law upon the subject.

THE MORRIS CANAL AND BANKING COMPANY *vs.* FAGIN
and others.

1. The canal company having filed their bill to restrain the defendants from occupying land, alleged to belong to the complainants, for their canal and embankment, an injunction was denied on final hearing, on the grounds that the title to the premises was in dispute and open to reasonable doubt, and that for the injury complained of an adequate remedy existed at law.

2. The principles by which injuries are tested in their character as nuisances, for the prevention or suppression of which courts of equity administer injunctive relief, are substantially the same, whether such nuisances be private or public. In either case, the injury must be such as the courts of law cannot adequately redress.

3. An injunction will not be granted where an action of ejectment will restore the complainant to all his rights.

4. Considering the canal as a public highway, the granting of an injunction to restrain encroachments on it will depend upon the extent to which such encroachments impede navigation.

5. Where, as in the present case, the alleged encroachment does not materially narrow the water way within the width it has for navigation,

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above and below the place where such encroachment exists, and does not interfere with the tow path, the injury, if a public nuisance, can be remedied by indictment; and if a private one, and the complainants claim title to the land, an action at law will afford sufficient protection and relief.

The hearing of this cause was had upon bill, answer, replication, and proofs, before the Vice-Chancellor, to whom the same had been referred.

Mr. J. F. Randolph and *Mr. Vanatta*, for complainants.

Mr. N. Perry, jun., and *Mr. G. N. Abeel*, for defendants.

THE VICE-CHANCELLOR.

In or about the year 1830, the complainants constructed their canal along Commercial dock, in the then town of Newark. The course of the Passaic river at this point is not far from southeast. Nearly parallel with the river, and several hundred feet from it on the southwest, was an ancient public highway called River street, or River road. The dock and land between the road and the river belonged to one Jonathan Cory. The canal was constructed between the southwesterly side of the road and river, but precisely where, with reference to these limits as they then existed, whether wholly on Cory's land or wholly in the street, or partly on his land and partly in the street, is a controverted matter in the cause.

Soon after the construction of the canal, Cory entered into an agreement with the company respecting a basin for commercial purposes in connection with his dock, to be made by him on his land opening into the canal, and between it and the river. This agreement was made in May, 1831. The basin was to be one hundred and thirty feet on its side next the river, and one hundred and twenty feet from it, with its sides extending about two hundred and forty feet to the canal. He was to pay \$1000 for the privilege of making it, which sum the company were to refund if they failed to sup-

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ply water sufficient to float boats, or, if it became necessary, to have it filled up. The company were to use the basin for their boats free of charge, and Cory to maintain its sides in good order, and to connect it with the canal by removing the bank. In pursuance of this agreement the basin was built, and continued to be more or less used by Cory and his assigns, in common with the company, from 1831 to 1866.

In the latter year the defendants had become owners of a tract of the original land of Cory, including the basin. On this tract, extending from the river to the canal, they had begun the erection of a flour mill next to the river, and were preparing to drive piles in and fill up the basin to erect on it a cooper shop, in connection with their mill, in the rear of it and adjoining the canal. The company objected in the first instance to the taking of the basin, but afterwards consented to it up to their line. The true location of that line became then the subject of dispute, and is the subject of dispute in this cause. Above the basin, through the city of Newark to the foot of the plane, the width of the water on the surface of the canal was about twenty-six feet. The defendants claimed this to be the true width opposite their land, and asserted that their title extended to a line twenty-six feet from the perpendicular wall on the opposite or southwesterly side. The company claimed title to a line forty-eight feet from such wall, leaving in dispute a strip of land twenty-two feet in width.

On the 27th of January, 1867, the company exhibited their bill of complaint, upon which an injunction was issued, restraining the defendants from driving piles on this strip, or otherwise obstructing the company in its use. Upon answer filed, a hearing was had, and on the 6th of April, 1867, the injunction was dissolved. The suit for an injunction being continued, voluminous testimony was taken, and the cause brought to hearing on the pleadings and proofs.

The company was incorporated in 1824. Its charter authorized a canal connecting the waters of the Delaware with the waters of the Passaic. A supplement passed January,

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1828, authorized the continuance of the canal to the waters of the Hudson, with the proviso that the canal should connect with the Passaic at the village of Newark, so that boats could pass from it to the river, and back. The original charter enabled the company, upon filing with the Secretary of State a survey of the route, to enter upon, take possession of, and use all lands so surveyed, subject to compensation thereafter to be made. This right of taking lands without compensation first made was withdrawn by the supplement of 1828, in respect to the continuation of the work to Jersey City. By this supplement no lands could be taken, except by consent of the owner, before appraisement of their value, with damages and payment or tender of the amount. But the company by this supplement were empowered in so continuing their canal, to construct it through, upon, or along any street in Jersey City or Newark, and by so doing no payments were required. In such case the width of the land occupied by the canal and its tow path was limited to thirty-two feet.

The outlet to, or connection with the river, required by this supplement, was made a short distance above the Commercial dock, which lay between the outlet and Jersey City. It is a question whether the canal at this point was a part of the original work, or of the continuation authorized by the supplement. The complainants insist that it was constructed under the act of 1824, and as a part of the original work. That the land taken for it, and on which it was actually made, was a part of Cory's land, between the river and the road, one hundred feet or thereabouts from the latter, and making a strip forty-nine feet ten inches wide, and nine chains and forty links long. These measurements are obtained, not from deeds or paper title from Cory or his assigns—for these they do not claim to have received—but from field notes and a map filed in May, 1828, in the clerk's office of the county of Essex, showing a canal route at that point. They do not claim under proceedings subsequent to or in pursuance of these field notes and map—which proceedings

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are prescribed by both charter and supplement—for it is admitted that such proceedings were not had. The field notes were filed to be used, as they say, if Cory should not give his consent, and were rendered superfluous for purposes of title when he afterwards consented. They allege that they entered on and took the lands described in the notes by virtue of the original act, which legalized such entry and taking without previous payment or consent. That such entry and taking gave them *title*, and that the value of the lands was given or remitted by the owner. That their tow path was at first on the side next the river, and when their land was disused for that purpose, and was flowed by the water of the basin, their title to it was in no wise impaired.

The defendants, on the contrary, deny that the canal was constructed of the width, or on the site shown by the field notes and map. They allege that it was constructed in River street, as it existed at that date, and as it still is. That the work was done in pursuance of the supplement of 1828, passed two years before, and thereby limited in width for the water way and tanks to thirty-two feet. That the present tow path is in River street, outside of a railing six feet from the perpendicular wall, which space of six feet, with the space occupied by the water way, make up the full width which the complainants are lawfully authorized to hold. They allege that the lines of River street, as they existed in 1830, were afterwards, and in 1855, designated and fixed by commissioners, lawfully appointed for that purpose by the authorities of the city of Newark. That the space of thirty-two feet, now occupied by the complainants, is within the street lines so defined, and that the title of defendants extends by their deed to the water edge of the canal.

It is not denied by the complainants that the canal is in part, if not wholly, within River street so defined. But they assert, and much of their evidence is directed to prove, that the original location of the street has been changed; that, in 1830, it ran upon a bluff, at the base of which, and some distance from the lines of the street, their canal is alleged to

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have been built; and that, by the cutting down of the bluff, the course and position of the street were shifted nearer to and upon the canal.

Whether or not the tow path was at first on the river side of the canal, and if so, for how long, and whether or not the canal was built upon the street, are questions of fact in regard to which many witnesses on both sides have testified. As to both questions, and especially the location of the canal with reference to the traveled track of the street, there is a direct conflict of testimony, which only the long lapse of time and the great changes in the aspect and condition of the street, can satisfactorily explain. Cory died in 1837. Captain Beach, the chief engineer, has been dead many years, and after diligent search among his papers, nothing has been found to elucidate the facts. The original field notes are lost. Lorenzo A. Sykes and Arnold G. Mason, witnesses of the complainants, were assistant engineers, and are relied on to prove that the canal was constructed on the lines, and of the width, laid down by the field notes and map of 1828. They speak from recollection, and think that it was; but their testimony is marked by some vagueness and uncertainty, and hardly amounts to determinate proof. Mason, when cross-examined, says that the west line of the canal at this place ran directly along the wagon track of the street, and that he did not think it interfered with the track, except at a point opposite where the land of the defendants now is. This does not show the route to have conformed to that of the field notes and map.

The foregoing statement sufficiently exhibits the nature of the title set up by the complainants, and the dispute in which it is involved. It is a *contested* title, open to reasonable doubt. They do not claim by prescription, by adverse possession, or by a lost deed, but by their entry and taking under the special authority conferred by their original charter. They do not claim an easement, but land. Their title, if good, can be enforced by an action of ejectment. The questions of law and of fact which this title involves, are specially

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those which a court of law is the proper tribunal to try. This being so, what jurisdiction has this court to investigate and determine them? It is said that the occupation of the premises by the defendants, and the erection thereon of their shop, is a nuisance which this court will restrain. That the canal is a public highway, and the action of the defendants an interference with it amounting to a nuisance, injurious to the public at large, as well as to the interests of its owners. That where a nuisance exists, such as this court will restrain or abate, the denial of the complainant's title will not oust it of jurisdiction to examine and adjudicate the right.

But in the present case, *the fact of the nuisance* is denied, as well as the title or right. The principles by which injuries or wrongs are tested in their character as nuisances, for the prevention or suppression of which courts of equity will administer injunctive relief, are substantially the same, whether such nuisances be private or public. In either case, the familiar rule is, that to authorize or justify such relief, the injury complained of must be such as the courts of law are unable adequately to redress. In *Stevens v. Erie Railway Co.*, 6 C. E. Green 259, an injunction was denied by this court, because ejectment would lie and an action for mesne profits would, in one suit, give damages for the detention. It was said by the court, that injunctions do sometimes issue to restrain constantly repeated trespasses requiring a continued succession of suits, but not where ejectment will restore the complainant to all his rights.

In the two cases of *The Morris & Essex R. Co. v. Prudden*, 5 C. E. Green 530, and *Carlisle v. Cooper*, 6 C. E. Green 576, the authorities and principles applicable to this subject are elaborately reviewed and discussed. In the former case it is said, that "the remedy by *indictment* being so efficacious, courts of equity entertain jurisdiction over public nuisances with great reluctance, and where an ample remedy for an invasion of the public right by indictment exists, a court of equity will not interfere by injunction, unless in a case of

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pressing necessity to relieve the public travel from immediate and serious inconvenience." In the latter case it is said, that "the jurisdiction of courts of equity over the subject of nuisance is not an original jurisdiction. It does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from an injury for which no adequate redress can be obtained by an action at law. As a condition to the exercise of that power, it is essential that the right shall be clearly established, or that it should have been previously determined by the action of the ordinary tribunals for the adjudication of the rights of the parties, and the injury must be such in its nature and extent as to call for the interposition of a court of equity."

The defendants having taken possession of the premises, driven piles on it, and erected their shop, the bill prays a decree and perpetual injunction that the obstruction be removed, and the complainants quieted in the peaceful and lawful possession. The canal at this point has not been narrowed within the width which, as before stated, it has above, through the city, to the base of the inclined plane. The line of the water edge along the shop and land occupied by the defendants, is a continuation of that directly above and below. The use of the canal as a public highway is there as free and advantageous as it is immediately above and below. The tow path is on the southwesterly side, and in the street, and from the necessity of the case, could not be on the side next the river. That side is the berme bank, the uses and value of which are stated by the then president of the company, Mr. Talcot, who was examined as a witness. "It forms," he says, "the canal, and holds the water; it is a hitching-place for boats when not in motion; forms a place for boatmen and canal repairers to walk along the canal; may be used to widen the canal, the water-way, if necessary; is of use to keep nuisances from the canal; is a place to load and unload cargoes; is a place to pass to and from, to keep the canal in order and repair when necessary."

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The manner in which adjacent owners occupy their lands on each side of the premises in dispute, would necessarily prevent or impede the occupation by the company of a berme bank for some of the purposes stated by the witness. Others of these purposes are not defeated by the defendants' occupation. But taking their character and value to be as he states, they are not such as to demand a different or more efficient protection than courts of law are competent to give.

There is nothing in these views at variance with the opinion expressed by the court when the injunction was dissolved. The general reference in the opinion to obstructions as a nuisance, applies only to the allegations of the bill and affidavits. Whether an obstruction is a nuisance, such as equity will prevent by injunction, depends obviously on its nature and extent; how far it stops or impedes navigation. What that nature and extent were, did not then appear, as they have since been disclosed by the proofs.

Upon the ground that the complainants' title should be settled at law, and the ground that the injury complained of can be there adequately redressed, I am of opinion, and do respectfully advise, that the relief prayed for should be denied, and the bill of complaint dismissed, with costs.

MORRIS vs. TAYLOR and others.

1. To support the defence of usury, the evidence must be clear and cogent.
2. The act of April 12th, 1864, respecting usury, does not do away with the forfeiture, though it lessens the severity of the penalty. The same strictness of proof is required since the act as before.
3. The fact of usury being exclusively within the knowledge of the parties, and their testimony respecting it conflicting, each testifying from recollection, and without any book of account or other record of their mutual dealings resulting in the mortgages alleged to be usurious; and neither being able to give a satisfactory statement of the various payments, loans, or securities included in the mortgages; *held*, that the usury was not established by the proofs.

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4. Where notes on which illegal interest had been reserved are included in a settlement of what is due between the parties, and a mortgage given upon a new agreement for the amount, the usurious taint will be extinguished.

The cause was argued upon the pleadings and proofs, before the Vice-Chancellor, to whom the same had been referred.

Mr. J. J. Ely, for complainant.

Mr. W. H. Vredenburg, for defendants.

THE VICE-CHANCELLOR.

The bill is filed to foreclose two mortgages, made by Taylor and wife, the defendants, to Morris, the complainant. The first is dated August 26th, 1867; the second, April 13th, 1869. Each mortgage is for \$2000, with interest. The defence set up in the answer of Taylor is, that both mortgages are usurious; that he did not receive for either mortgage the sum it was given to secure, but for the first only \$1746.10, and for the second only \$1590.

The facts in regard to the true consideration of the mortgages are exclusively within the knowledge of the parties, and both have testified as witnesses. They contradicted each other in direct and irreconcilable terms.

Prior to the giving of each mortgage, there had been mutual dealings between them, covering considerable time, and involving the particulars of cash loans, checks, and notes, of which each speaks from recollection, and without any book of account or regular record made of the transactions as they occurred.

These dealings resulted successively in the two mortgages in question, though neither is able to state, with clearness and certainty, what items were included, or how the amount of each was made up. The loose manner in which their dealings were conducted, is sufficient to account for some of the confusion and inaccuracies apparent in the statements of

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both, but not for the direct conflict which their testimony exhibits. Upon carefully considering the proofs, I am by no means free from suspicion and doubt as to the second mortgage, but cannot, upon the whole, regard the evidence as sufficient to justify the conclusion that either is usurious, still less to enable me to say what amount, if any, was usuriously reserved. To maintain this defence, the evidence must be clear and cogent. The burden of proof is on the party setting it up. These familiar rules have been repeatedly laid down by the courts of this state.

In *Brolasky v. Miller*, 4 *Halst. Ch.* 790, Justice Potts, delivering the opinion of the Court of Appeals, says: "Usury should be strictly proved. It is not sufficient for the party who sets it up to make out a *probable* case. We cannot undertake to guess away men's rights upon vague or doubtful testimony."

In *N. J. Patent Tanning Co. v. Turner*, 1 *McCarter* 326, Chancellor Green says: "It is not enough that the circumstances proved render it highly probable that the transaction was usurious. The usury must be proved, not left to conjecture."

In *Barcalow v. Sanderson*, 2 *C. E. Green* 464, Justice Elmer, delivering the opinion of the Court of Appeals, says: "While it is the duty of the court to maintain the law against usury, and carefully to prevent its evasion by any shift, covin, device, contrivance, or deceit, we are not called on to enforce its severe penalties, without evidence entirely satisfactory and free from doubt."

In *Conover v. Van Mater*, 3 *C. E. Green* 481, arising after the supplement to the act respecting usury, approved April 12th, 1864, it was held that while that act lessened the severity of the penalty, it still worked a forfeiture, and that the same rule of evidence must still apply to such a defence, as had always, both at law and in equity, been adopted in case of penalties.

In the present case, Taylor testifies that for the first mortgage he received two checks, one for \$1000, and an-

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other for \$746.10 ; and that these formed the whole consideration he ever received for it. Morris denies this, and says that when the mortgage was given, they had a settlement of their dealings ; that Taylor owed him borrowed money ; and that the two checks were given for the difference between what he owed and the amount of the mortgage. He swears that he did not keep back any part of the difference between the amount of the checks and the amount of the mortgage, and that he received nothing in any way as a bonus. Taylor, on the contrary, swears that he never, in any way, received from Morris the difference between the checks and the mortgage ; but, while admitting that he had money dealings with him before the giving of the mortgage, says that he then owed him nothing but a note, which he thinks was for \$400, and which he afterwards paid and took up. Morris testifies that the difference was for money previously lent, not by check, but in cash. He kept no book account of it, and cannot give the items ; but swears, positively, that he lent him the money, and, as near as he can recollect, within a month before the mortgage ; that Taylor had the money at two or three different times, of which \$100 was had at one time ; and that they afterwards figured up what was owing, and he gave the check for the balance.

Taylor does not deny that Morris lent him money prior to the first mortgage, but says that he lent him none out of his pocket, nor without taking something to show for it. To prove that Taylor was wrong in this, one Jacob W. Buck was produced, and testified that in 1866 or 1867, he saw Morris let Taylor have money—more than one bill, but could not say how many. He says it was at the time Taylor was building. It appears from Taylor's testimony, that he was building during the season when this mortgage was given. The testimony of Buck corroborates the story of Morris.

A further corroboration is found in the testimony of one James Danby, who says, that in the fall of 1867, at his mill, he had a conversation with Taylor about his getting money

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from Morris, and that Taylor then told him that he had got \$2000 from Morris, on bond and mortgage, and that he had charged him nothing for it.

It is unnecessary to review the evidence in detail. I am satisfied that Taylor is wrong in saying that \$1746.10 was the whole consideration of this mortgage, and think the weight of the evidence to be, that he received the full amount named in it. It was given in August, 1867. Several years afterwards, when numerous other transactions had intervened, quite likely to produce confusion and uncertainty in his mind as to the items of them, and still more as to what had previously occurred, he attempted to give from his memory, or by the aid of his bank book, the particulars that made up this mortgage. It is not necessary to question his veracity, but his testimony is not such as to inspire confidence in its accuracy, and is contradicted by his statements at the time. The probable erroneousness of what he says of the first mortgage, impairs confidence in what he says of the second. As to the latter mortgage, there is more room for doubt than as to the first. I am satisfied that Taylor received more for it than the \$1590, which he names. But that he received the whole of the \$2000 it was given for, may well be doubted. The testimony of Morris in regard to it, is unsatisfactory and fairly open to criticism. But the same is true of the testimony of Taylor. Much of the testimony of both relates to this mortgage. What I have before said of the character of their mutual dealings, the loose way in which they were conducted, and the evident inability of either party to give the true and full particulars, is more applicable to this mortgage than to the first.

Morris says, in substance, that when it was given, a settlement was made between him and Taylor, and that what he then owed him on outstanding notes, and for borrowed money, together with the check of \$600 then given, made up \$2000. But he cannot give items; and speaks with

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vagueness of dates and amounts. They differ as to what securities were included in it—a note for \$150 being alleged by Morris to have been included, and denied by Taylor. It seems to me probable, from the evidence, that this note was included and forms part of the true consideration.

It is quite obvious that in so many different money transactions as are shown to have occurred between the parties, and following which these mortgages were given, illegal reservations might easily have been made that cannot now be established by proofs. There is good ground to suspect that such reservations were made. Morris' story is, that the second mortgage was upon a settlement in discharge of outstanding notes, and for money due, as well as for money then paid.

Assuming that these notes, or some of them, were usurious, as Taylor in his answer and testimony alleges, the effect of a new security given in renewal or discharge of them, upon a settlement and new agreement between the parties, would be to wipe out the usurious taint. *State Bank of Elizabeth v. Ayres*, 2 Halst. 130; *Hoyt v. Bridgewater Copper Mining Co.*, 2 Halst. Ch. 253; *De Wolf v. Johnson*, 10 Wheat. 367.

If the story of Morris be true, the alleged illegal reservations of \$110, on these notes, would be cured by the subsequent agreement and mortgage.

Upon the whole evidence, tried by the settled rules to which it must be subjected, the defence in this case has not, in my judgment, been maintained. The defendant may not have received the full sums named in the mortgages, but that he did not, must appear beyond reasonable doubt. While the transactions were fresh, he declared, under his own hand and seal, that he had received them. He cannot now ask this court to declare to the contrary, except upon evidence that admits of no other probable conclusion. Each party testifies for his own interest; but the defendant is impeaching his own solemn obligations, and denying the truth

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of his former statements and acts. To prevail, he must leave no serious misgivings in the mind of the court, as to his latest statements being the true ones.

I must advise a decree in accordance with the above.

ACKENS vs. WINSTON and others.

1. Where the bond and mortgage call for interest, without naming the rate, the rate fixed by the law at the date of the instruments will be chargeable.

2. Where the mortgage is recorded in full, and provides for the payment of interest during the ten years, at the end of which the balance of principal is to be paid, without saying how often during such time, a purchaser of the mortgaged premises has notice from the record that some periodical payments of interest were intended, and the fact that these payments were to be yearly, may be proved so as to bind him.

3. Such proof does not contradict or alter the terms of the instruments, or their expressed meaning, but supplies their obvious omissions and corrects their ambiguities, subject to which the purchaser bought.

4. It appearing that yearly payments were intended, held that this should be decreed to be the true construction of the mortgage, and that the complainant was entitled to recover the interest for each year remaining unpaid, and, under the circumstances of the case, the costs of the suit.

5. Where the mortgage in such case provided that in default of payment of interest within sixty days after the same became due, the whole principal should be immediately due, the payment of such principal was not enforced, because the conditions on which immediate payment depended were not stated with sufficient explicitness. The true interpretation and construction of the conditions being settled, they may be operative as to the future, but not as to the past.

The bill in this cause was filed to foreclose a mortgage for \$2500, dated July 24th, 1865, made by Murphy and wife to Ackens, to secure part of the purchase money of land in the county of Morris, conveyed by Ackens to Murphy. The controversy grows out of the provisions of the mortgage and the bond, respecting the rate of interest and the time when interest is payable.

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The condition of the bond is in these words: “\$2500 according to a mortgage of even date with this, lawful money aforesaid; five hundred in five years from the first of April next, and the balance in ten years from the first of April next; the whole sum to come due if the interest is not paid within sixty days from the time it is due, at any time in the ten years, with interest for the same, at the rate of lawful per cent. per annum, interest to commence from the first of April next.”

The proviso of the mortgage is for the payment of \$2500, as follows, viz.: “Five hundred dollars in five years from the first of April next, and the balance in ten years from the first of April next, interest to commence on the first of April next, A. D. 1866, on the whole sum; and it is agreed by both parties that if the said Murphy does not pay the interest within sixty days from the time it becomes due, at any time during the ten years, then the whole sum becomes due, both principal and interest, and may be prosecuted at any time the holder sees fit so to do, according to a bond bearing even date herewith.”

The mortgage was recorded in full in the clerk's office of Morris county, August 26th, 1865. Murphy and wife conveyed the mortgaged premises March 6th, 1869, to Joseph and James C. Blake, who, with their wives, conveyed on the same day to the defendant, Winston.

The interest claimed to be due for the year ending April 1st, 1870, not being paid within sixty days, or at any time thereafter, the bill was filed, alleging that the bond and mortgage were intended by the parties to call for interest, payable yearly at the rate of six per cent., and praying that they be reformed so as to express such agreement, and that the whole principal of \$2500 be decreed to be paid, with interest, by reason of the non-payment of the year's interest for more than sixty days after the same became due.

The cause was heard upon the pleadings and proofs before the Vice-Chancellor, to whom the same had been referred.

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Mr. F. A. Demott, for complainant.

Mr. F. G. Burnham, for defendant.

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It clearly appears from the evidence, and was admitted on the argument, that the intention of the parties to the mortgage was that interest should be payable yearly, and at the rate of six per cent. per annum. The scrivener who drew the papers testified that he was instructed by Murphy and by Ackens to insert in them provisions to that effect, and that he thought he had done so.

It was also admitted that the defendant, Winston, had no notice of this intention of the parties, except so far as he is chargeable with it by the record of the mortgage.

I see no difficulty as to the *rate* of interest. At the date of the mortgage, the lawful rate in that county was six per cent. The bond calls for interest at the rate of lawful per cent., and the mortgage for interest from the first of April next after the date. The law fixes the rate; and the omission of the parties to name it cannot affect the complainant's right to recover at that rate against the mortgagor or his assigns.

As to the *time* when interest is payable, it is clear from the terms of the mortgage that it was to be paid before the expiration of the ten years. This is not by implication, but by express statement. The language is "within sixty days from the time it becomes due at any time *during* the ten years."

The language is sufficient to notify the defendant who purchased subject to the mortgage, that periodical payments of some kind were intended, and to put him on inquiry as to what such periods were. He cannot, it is true, be affected by a reformation of the instrument which substantially changes their terms and alters their effect, however proper such a reformation may be as between the parties to the instruments, but he is subject to the agreement contained in the mortgage, and to such construction and interpretation of

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it as its obvious omissions or ambiguities may require. The evidence shows that yearly payments were intended. The prevailing usage as to mortgage debts is to pay interest as often, at least, as once a year. This is the true construction of the mortgage, and must be so decreed. It does not contradict or alter its terms, but settles its meaning and operation in accordance with the proofs, in accordance with the inference the defendant might reasonably have drawn from it, and in accordance with the information he might easily have acquired. Under these circumstances the complainant is entitled to recover the interest for each year remaining unpaid, together with his costs of suit.

The stipulation that in default of payment of interest within sixty days after the same becoming due, the whole principal shall be payable, cannot be enforced in this suit. This is so, not because the stipulation works a forfeiture which equity does not favor, but because the immediate payment of the whole principal is declared in the mortgage to be dependent on conditions, and these conditions are not expressed with such explicitness and certainty as to entitle the complainant now to the aid of this court in enforcing them. The true meaning being now settled, the conditions may be operative as to the future, but not as to the past.

I respectfully advise a decree in pursuance of the above.

SHIELDS vs. LOZEAR. LOZEAR vs. SHIELDS.

1. The defence of incapacity to contract—*held*, in this case, to be unsupported by the proofs.

2. Tender of the amount due on the mortgage, after its maturity and acceptance refused by the mortgagee in possession—*held*, in this case, on bill to redeem, to entitle the complainant to a decree with costs.

3. The effect of a tender lawfully made is to discharge the debtor from subsequent interest and costs. But, to have this effect, the amount tendered must be kept in readiness, and, on bill to redeem, or on plea or answer

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setting up tender, the money must be paid into court. No less strictness is required in such cases in equity than at law.

4. Differences among the authorities as to the meaning of the term "readiness to pay."

5. The mortgagee in possession held to account for rents, at the rate agreed on between the parties during the year prior to the maturity of the mortgage.

The two causes were argued together, upon the pleadings and proofs, before the Vice-Chancellor, to whom the same had been referred.

Mr. Vanatta, for complainant.

Mr. J. G. Shipman, for defendant.

THE VICE-CHANCELLOR.

On the 9th of April, 1867, Samuel M. Lozear and wife conveyed their dwelling-house and lot, in Hackettstown, to Thomas Shields, jun., for \$7000, and for part of the price took back a mortgage for \$4000, payable on the 1st day of April, 1868. He then took a lease for the term ending on the last named day: the rent being the interest, at seven per cent. yearly on the price, together with the payment of the taxes and water rents, when due. A year's interest, to accrue on the mortgage, was then credited in advance on the bond, and the balance of the price was secured by promissory notes, without interest, and payable at the end of the term in the lease.

On the 1st day of April, 1868, Shields failed to make tender of the principal of the mortgage, but afterwards made tender of it, and of the interest accrued. Its acceptance was refused by Lozear, when Shields brought an action of ejectment, in the Supreme Court, for the possession of the premises, by virtue of his deed. In this action the mortgage was set up in defence, and judgment given in that court for defendant, and by the Court of Errors affirmed, on the ground that tender made after day of payment named

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in the bond, did not terminate or extinguish the defendant's right to hold under the mortgage.

A bill to redeem was then filed by Shields, and an answer and cross-bill by Lozear. His answer and cross-bill set up his incapacity to contract. They allege that from July, 1864, to March, 1868, he was deprived of his reason, his judgment, and his will, to such an extent as to disable him from executing a contract or deed, or making sale of his land. The object of the cross-bill is to have the sale and conveyance annulled, and the deed, mortgage, and other papers growing out of the transactions, decreed to be void. The two causes were argued together.

At the time of the transactions, Lozear was a blacksmith, working at his trade; was turned of middle life; industrious and active, and a member of the Methodist Church. A difficulty with a fellow member of the church in 1864, is shown to have excited and disturbed him. His temperament is proved to have been irritable and nervous. He talked of selling his place and moving away. The premises where he lived adjoined those of Shields, who, on that account, was desirous to buy. In 1865, or thereabouts, they had negotiated for a sale. Lozear then offered the property to Shields for \$5500, which was agreed to be given, but no writing was signed; and Lozear afterwards stating that his wife was unwilling to give up the property without \$500 more being paid for it, the matter was dropped. Shortly prior to the 17th of September, 1866, he was offered by Caleb H. Valentine \$2000 for the vacant part of the property, which offer he declined, assigning as the reason that he wanted to sell the whole and move on a farm. He offered to take \$7000 for the whole. This was the price he had fixed upon and was then seeking to get. He talked of it with Andrew J. Winter, who worked with him daily in his shop, and offered him \$50 to find a purchaser at that price. He said to this witness on quitting work at the end of the day, that he was going to see Shields and give him the refusal of the property, and if he didn't take it he had

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another man who would. The next morning he told Winter he had sold it to Shields, and gave him the particulars of the bargain. On the evening of the 17th of September, 1866, he did go to Shields, who did not expect him, and had no notice of his coming. He told him he had come to sell the property; that his folks had talked the matter over and were perfectly willing, provided he got his price; that \$7000 was the lowest; that he would have an article drawn and take money on it. The terms of payment were then agreed on and the bargain concluded. Col. Valentine, who was sitting on the porch of the store, was called in and asked to draw the agreement, which he did. It was read over by him to Lozear, who signed it, and received \$50 on account of the price. The agreement called for the delivery of the deed on the 1st of April then next, a mortgage for \$4000, and approved notes for the balance. Several weeks after the agreement, Lozear took to Col. Valentine two deeds describing the property, and asked him to draw the conveyance to Shields; told him that his wife was becoming dissatisfied with the sale; that he wanted the deed executed before trouble arose, and would try to get Shields to close it at once. Col. Valentine accordingly took up the deed to be signed by Mrs. Lozear, who refused. On the 9th of April, 1867, the papers were executed, as stated above. The lease was then given at Lozear's request. During 1866-'67-'68, he worked regularly at his trade, with occasional interruptions when sick, kept his accounts, collected his bills, and settled with his customers. He several times told Winter of the discontent of his wife, and once that his family wanted him to plead crazy to hold on to the property.

It is unnecessary to review, or even to refer to the evidence of the numerous witnesses whose testimony has been taken. The price of the property is shown to have been ample. His intelligence and capacity are attested by his neighbors and acquaintances, who saw him frequently, did business with him, and had the best opportunities of judging. Eccentric and excited conduct has been shown, and much

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has been attempted to be made of the difficulty with a fellow member of the church, which is alleged to have unsettled his mind. To this difficulty great importance has been attached by his wife and some of his family. But I think it manifest from the proofs, that not to that cause, but to their dissatisfaction with the sale, engendering in their minds the notion, and perhaps the honest conviction, of his mental unsoundness, must be attributed the opinions on this subject, which they and some of the witnesses have expressed.

I am of opinion that the defence is unsupported by the evidence, and that the cross-bill should be dismissed with costs.

By a mistake of the complainant as to the true time of payment, he failed to make tender of the principal of the mortgage on the day it fell due, and thereby lost his strict legal rights. His repeated attempts afterwards to make it, were resisted by the defendant and his family. The door of the house was kept locked, entrance denied, and the defendant could not be found. But on or about the 20th of June, 1868, tender was formally made and refused, the defendant saying to the witnesses who offered him the money, that he would not take it; that he did not propose to let Shields have the house; that he had been too sharp for him, and that he wanted to stay in the house where he was. Under these facts, the complainant is entitled to a decree, and to recover his costs of the suit.

The effect of a tender, when lawfully made, is to discharge the debtor from subsequent interest. But to have this effect, the amount tendered must be kept in readiness, and on bill to redeem, or on plea or answer setting up tender, the money must be paid into court. No less strictness is required in such cases in equity, than at law. In *Gyles v. Hall*, 2 P. Wms. 378, it is laid down, that to entitle the mortgagor to a discharge of interest, it must appear that ever since the tender and refusal he has kept the money ready for paying off the mortgage, and that no profit has been made of it. That the party making the tender must be at all times there-

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after *in readiness* to pay, does not appear to be anywhere questioned; but that no use should be made of the money, and no profit derived from it, has been denied. In *Curtiss v. Greenbanks*, 24 Vt. 536, it was insisted that the tender was of no avail, from the fact that the money paid into court was not the identical money previously tendered, and that to keep a tender good, the identical money offered must be kept ready to be paid over on demand, or at the proper time to be paid into court. This insistment was not sustained. It was held that because the money when tendered and refused does not, as a specific article does, become the property of the person to whom the tender is made, the party making it is at liberty to use it as his own, and that all he is under obligation to do, is to be ready at all times to pay the debt in current money, when requested. The same thing was declared by the Supreme Court of Arkansas, in *Woodruff v. Trapnall*, 7 English 640. He who tenders, it was said, must hold himself in readiness to pay; but in case of tender before suit, the party makes no deposit, he keeps the money, and may use it if he will, but must hold himself in readiness to pay.

But whatever doubts may exist as to the true meaning of *readiness to pay*, the authorities are agreed, that to stop interest, the money must be paid into court on filing the bill. *De Wolf v. Long*, 2 Gilm. 679; *Doyle v. Teas*, 4 Scammon 267; *Jarboe v. McAtee*, 7 B. Monroe 279; *Taylor v. Reed*, 5 Mon. 36; *Stockton v. Dundee Manufacturing Co.*, ante p. 56.

The complainant in this case not having paid the money into court, it is unnecessary to decide how far he is shown by the evidence to have made use of the money tendered, or what the effect of such use would be. He will be charged with the interest from the 1st of April, 1868, at the yearly rent of seven per cent.

The defendant and mortgagee in possession should account for the rents from the same date, upon the terms agreed on by the parties for the year covered by the lease. This will

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be the sum of \$490 yearly, being the interest on the price for which the property was sold, together with the water rents and taxes, if any, that are due and unpaid. These may be ascertained upon a reference to a master, who will add their amount to the yearly rent aforesaid, and deduct the sum from the amount of \$4000, principal and interest, as above. The balance so found to be due to the defendant, should be paid within ninety days from the coming in, or the confirmation of the report.

I respectfully advise a decree in accordance with the above.

SWEET vs. PARKER.

1. The complainant is inadmissible as a witness where the answer is by a party in a representative capacity.

2. Where the bill prays an answer without oath, the answer if sworn to is treated as if it were not.

3. Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit. Where it is the *interest* which the court is considering, and the owner merely as the guardian of that interest, and others are present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be required.

4. Where the fund is in the hands of a trustee for the life of the parent who takes a life interest, and her children the principal upon her death, and in a suit affecting such fund the trustee and parent are defendants, an objection taken at the hearing for want of parties because the children have not been joined as defendants, will not prevail. The interest of the children has been protected by their representatives.

5. A deed given as security decreed to be a mortgage, and the grantor allowed to redeem.

6. In a suit to have a deed absolute on its face decreed to be a mortgage, parol evidence is admissible, not to establish an agreement to reconvey which equity will enforce, but to establish the true nature of the instrument by showing the object for which it was made.

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The cause was argued on the pleadings and proofs, before the Vice-Chancellor, to whom it had been referred.

Mr. Richey, for complainant.

Mr. J. Parker, for defendants.

THE VICE-CHANCELLOR.

Erastus P. Sweet and wife, by deed of July 8th, 1858, conveyed to Charles Parker their homestead, in Trenton, for the consideration named in the deed of \$900. On the 4th of October, 1862, Charles Parker died, leaving a will. After certain bequests, the will directs his property, personal and real, to be turned into money by Joel Parker, his son and executor, and held by him in trust for the other children of testator, to wit, Charles Parker and Mary Ann Glover, during their lives, and afterwards to their children, if any, on coming of age.

The bill is filed to have this deed declared a mortgage; alleging it to be only a security for indebtedness, given on the grantor's agreement to pay interest at six per cent. yearly while the indebtedness continued; he to remain in possession and pay all taxes and needed repairs, and to have the premises re-conveyed on payment of principal and interest due. It prays a re-conveyance by the executor under the will, or by the three children, defendants in the suit, on payment as above, and asks an answer without oath.

The defendants in answer deny the allegations of the bill, and set out their reasons for believing the deed to be absolute according to its terms. They say they are willing and anxious that whatever is just and equitable should be done, but as minors are interested in the ultimate disposition of the estate, and as the deed is without qualification or condition on its face, so far as they know, they deem it their duty to require the complainant to prove strictly his claim, and submit the matter to the decision of the court.

Five witnesses were sworn for the complainant, of whom

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he was one. His testimony was objected to by the defendants, under the act concerning witnesses of March 18th, 1859, the defendants being sued in a representative capacity. His competency is claimed under the act of April 5th, 1855, admitting the complainant to disprove those parts of the answer responsive to the bill. The case of *Lanning v. Administrator of Lanning*, 2 C. E. Green 228, was cited to sustain it. It was decided in that case that this provision of the act of 1855 was not repealed by the act of 1859, and the complainant was held admissible after the administrator had been substituted as defendant. But in that case the answer had been sworn to and filed by the original defendant, and was evidence in the cause, notwithstanding his subsequent death and the continuance of the suit against his representative. To exclude the complainant there, would have been to destroy the equality which it is the object of both acts to maintain. In the present case the answer is not evidence, though sworn to, because, first, its denials, or the facts it alleges, are not within the knowledge, and are not averred so to be, of the parties who answer; and because, secondly, the bill prays an answer without oath. When this is done, the answer if sworn to is treated as if it were not. *Stevens v. Post*, 1 Beasley 408; *Hyer v. Little*, 5 C. E. Green 443. The testimony of the complainant must be therefore overruled.

It is further objected that necessary parties are wanting in the bill—that the children of Mrs. Glover, who, on her death, take under the will, have an interest in the fund to be affected by the suit, and should have been joined as defendants with their mother and the executor and trustee. This objection was not raised by demurrer, or till the hearing; but if the parties be necessary to the final determination of the cause, the objections must prevail. Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit. The reason or principle of such exceptions is stated as follows in *Calvert on Parties*, sec. 2, p. 20: “If they are required to be

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parties merely as the owners and protectors of a certain *interest*, then the proceedings may take place with an equal prospect of justice if that interest receives an effective protection from others. It is the *interest* which the court is considering, and the owner merely as the guardian of that interest; if, then, some other persons are present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required, and the court may, without putting any right in jeopardy, take its usual course and make a complete decree." Here the executor and trustee, whose representative character is derived from the law, and the mother having a life estate in the fund, have both defended the suit, and protected the children's interest as well as their own. The case of *Van Doren v. Robinson*, 1 *C. E. Green* 256, was cited for the objection, but does not support it. The *cestuis que trust* had there a different interest from an interest *in the fund* to be affected by the suit. In *N. J. Franklinite Co. v. Ames*, 1 *Beas.* 507, it was held that *cestuis que trust* were not necessary parties where a mortgage for their benefit was questioned. Their trustees were said to represent them. The same doctrine applies to the owners of distributive shares of an intestate's estate, and to residuary legatees under a will. In suits affecting such funds the administrator and executor are sufficient parties, without joining those to whom the fund is to go. I think the objection should not be sustained.

As to the true character of the deed—whether a security which the complainant is entitled to redeem—the evidence consists of the declarations of the testator, made to Israel Howell and Daniel Fell about the time it was given; of the course of the transactions between complainant and himself to the time of his death, the former continuing in possession, making needed repairs, and paying taxes and interest on the amount of the debt; of the manner in which the indebtedness arose, a part of it existing at the date of the deed, and the balance arising

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afterwards by advancements in aid of complainant, and in several sums. A statement in detail of this indebtedness was prepared by testator shortly prior to his death, and has been offered as an exhibit by the defendants, in pursuance of their purpose to have the facts ascertained. It evinces a scrupulous exactness as to dates and amounts, and though standing alone would not avail to control the effect of the deed, yet connected with the testimony of Howell and Fell, and the other facts and circumstances in the cause, clearly proves that the deed was originally taken, and continued to be held as a security, and nothing more. The value of the premises at the giving of the deed was about \$1500; the consideration named in it \$900; the amount of the advancements when given \$553.45; the amount due at testator's death \$1078.25. Since 1858, the value of the premises has greatly increased.

The efficacy of the parol evidence is not to establish an agreement to reconvey, the specific performance of which this court will enforce, but to establish the true nature and effect of the instrument, by showing the object for which it was made. It is well settled that this may be done. The question is, whether the transaction was a sale and conveyance, coupled with an agreement for a reconveyance, or whether it was a security for a loan. Any means of proof may be used to show it to be the latter: the declarations of the parties; the relations subsisting between them; the possession of the premises retained by the complainant; the value of the property, compared with the money paid; the understanding that the sums advanced should be repaid, and the payment of interest meanwhile on the amount. The distinction between parol evidence to vary a written instrument, and parol evidence showing facts which control its operation, is employed to reconcile the allowance of such proofs with the statute of frauds, and the general rules of common law. Deeds absolute on their face have been frequently decreed to be mortgages by this court, and the grantors allowed to redeem. *Phillips v. Hulsizer*, 5 C. E. Green 308, and the cases there cited. In *Thornbrough*

CASES IN CHANCERY.

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. *Baker*, 3 *Lead. Cas. in Eq.* 604, the general doctrine is expounded, and in the appended American notes, illustrated at large, and the principles on which parol proofs are allowed, fully examined and explained.

It is plain from the proofs in this case, that the testator's original purpose was beneficial to Sweet, and as such, was carried out while he lived. His death, and the interest of the minors under the will, necessitated a resort to this court, which I am satisfied would not have been required had he lived, or had either of them anticipated the situation of the property, as affected by his death. Under the facts, as established, I am of opinion, and respectfully advise, that the deed be decreed to be a security, and the complainant entitled to redeem, on payment to the executor of the principal sum of \$1078.25, with interest at the stipulated rate of six per cent. yearly from the last payment of interest, together with the defendant's costs of this suit; such payment to be made within ninety days from the first day of this term, and the premises to be thereupon conveyed to the complainant by the executor, under the authority of the will and of the decree.

THE INHABITANTS OF THE TOWNSHIP OF GREENVILLE vs SEYMOUR and others, Commissioners.

1. A preliminary injunction will not be granted on doubtful points constitutional law; nor to restrain the execution of laws because the authority delegated by them may be used unwisely, or injuriously to public.

2. This court will not interfere with the exercise of delegated powers within the limits allowed by the acts conferring them, but the perversity or abuse of such powers, either actual or threatened, will be restrained, and made to appear.

3. In this case an injunction denied because the provisions of the act, however impolitic or oppressive, were within the power of the legislature to enact, and no sufficient cause was shown to interfere with the action of the commissioners.

Inhabitants of Greenville v. Seymour.

On rule to show cause. Argued on bill, answer, and affidavits, before the Vice-Chancellor, to whom the same had been referred.

Mr. J. F. McGee and *Mr. Ransom*, for complainants.

Mr. Leon Abbett, for defendants.

THE VICE-CHANCELLOR.

The defendants derive their appointment, duties, and powers, from the provisions of five several acts of the legislature relating to the township of Greenville, in the county of Hudson. These acts were respectively approved, as follows: April 2d, 1866; March 27th, 1868; March 9th, 1869; April 2d, 1869; and March 2d, 1870. By their terms they constitute five persons "Commissioners of Surveys," and "The Street Commissioners of Greenville;" and empower them to map the township, to lay it out in streets, to vacate old streets, to prevent the opening of new ones without their approval, to establish grades, to cause streets to be worked, paved, or lighted, to make contracts for necessary works and improvements, to issue "improvement certificates" to contractors in payment for work and materials, to borrow money on the credit of the township, and to exercise other functions and powers relating to streets, avenues, and parks, which it is unnecessary more particularly to state.

Under these acts, the defendants were going on with the opening, working, and general management of the streets, expending thereon the public moneys, and contracting township debts.

The bill for an injunction is filed by direction of the township committee, in the name of "The Inhabitants of the Township of Greenville." Its object is to restrain the defendants from further proceedings under said acts, or any of them, and from exercising any power or powers therein conferred.

The numerous special grounds on which the injunction is

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asked for, are all included in two general statements: first, that the map of the township, whercon its streets and avenues are designated, and according to which the defendants are going on with their work, is insufficient, incorrect and illegal, and that the manner in which the defendants have carried on and conducted the work is injudicious, improper, unnecessarily expensive, and highly injurious to the interests of the township; second, that the legislative acts above mentioned, or some of them, as to a number of their provisions, are unreasonable, unconstitutional, and void, and ought to be so declared by this court.

Since the hearing of the argument in which these special grounds were discussed, the most important and substantial of the questions involved in them have been decided by the Supreme Court of this state, in the case of *The State ex rel. The Hudson County Land Improvement Company, v. Seymour and others*.

The certiorari in that case was directed to the same officials who are defendants in the bill of complaint. It brought up for review the same map according to which the commissioners are now working, and presented for adjudication the constitutional objections mainly relied on by counsel in their argument in this court.

Before the decision of the Supreme Court was rendered, my conclusions were given adversely to the prayer of the bill. In view of the fullness of the opinion of that court, overruling the objections there raised, and sustaining the sufficiency of the map, it is unnecessary to do more than refer to it in support of those conclusions.

A preliminary injunction will not be granted on doubtful points of constitutional law; nor to restrain the execution of laws because the authority delegated by them may be used unwisely, or injuriously to the public. In the present case, in the absence of the decision of the Supreme Court, there seemed to me no serious doubt that, however impolitic and oppressive some of the provisions of these acts may be deemed, the legislature had the power to enact them. The

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defendants are vested with extensive and extraordinary powers to lay out and control streets, to affect, in various ways, the interests and property of the inhabitants of the township, and impose on them the burdens of public debt. But this court cannot interfere with the exercise of those powers within the limits of the discretion allowed by the acts themselves. The remedy for the evils apprehended from their exercise is with the legislature. The perversion or abuse of such powers, actual or threatened, this court will restrain, when such perversion or abuse are made to appear. But, so far as the pleadings and affidavits now disclose, I can find no grounds on which an injunction can issue.

I shall advise that the injunction be denied.

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PREROGATIVE COURT.

MAY TERM, 1871.

In the matter of the Probate of the Will of SOPHIA A. KIRKPATRICK, and granting administration of her estate.

1. Where it appears from the attestation clause, that the will offered for probate as the last will and testament of the testatrix, was signed and declared by her to be such will, in the presence of the subscribing witnesses, the statutory requirement that both witnesses should be present at the same time, is shown to have been complied with.

2. A cancellation of a legacy, by the testator, by drawing lines with a pen across the words, is a sufficient revocation.

3. In this state, when the executor dies before the testator, a residuary legatee is entitled to administration in preference to legatees, next of kin and creditors. And it is not discretionary with the Ordinary or Surrogates to grant it to any other person than the residuary legatee, when he is willing and able to accept.

4. Where the residuary legatee is a corporation aggregate, administration with the will annexed will be granted to one of their own number, named by them for that purpose.

5. Legatees, or their nominee, have no right to administration in preference to next of kin. The residuary legatee has such right. And where there are next of kin, administration cannot be granted to a person of the legatee's selection, until the next of kin have been cited, consented, or received notice.

The will in this case was produced for probate by John Chetwood, esquire, in presence of the President of Rutgers College, the residuary legatee in the will. There was no caveat against the will, nor any dispute about its execution or validity. None of the next of kin of the testatrix intervened in any way. There were petitions presented by most of the specific legatees, that John Chetwood, esquire, who had been the counsel and the confidential adviser of the testatrix, should be appointed administrator, with the will annexed. His father, John J. Chetwood, the sole executor named in the will, had died before the testatrix, and within a year

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after the execution of the will, which is dated August 30th, 1859. The testatrix died in March, 1871.

The trustees of Rutgers College, the residuary legatee in the will, presented a petition, signed by their President, with the corporate seal, attested by their treasurer, annexed, requesting that administration be granted to James A. Williamson, one of their own number, whom they had designated for that purpose, and insist upon their right to have the administration committed to him, or some person named by them.

None of the next of kin have joined in either application, or presented any application on their own part.

Mr. B. Williamson and Mr. I. W. Scudder, for Mr. Chetwood.

Mr. G. C. Ludlow and Mr. J. C. Elmendorf, for Rutgers College.

THE ORDINARY.

The first question presented, is upon the probate of the will. The subscribing witnesses are both dead. But their signatures to the attesting clause are fully proved, and are evidence of the facts recited in that clause; that she signed, published, and declared that paper as and for her last will and testament in their presence, and that they signed their names to it in her presence; although it does not recite that they were both present at the same time at the signing, yet there being but one signature of the testatrix, the fact that both saw her sign shows the presence of both at the same time. It is also proved, *aliunde*, that her signature is in her handwriting. Such proof is advisable, as it is of a most essential fact, although the presumption arising from the attestation of the witnesses, renders it not absolutely necessary.

Two of the legacies in the will are canceled by lines drawn with a pen across and upon the words. It is abundantly

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shown that this canceling was done by the testatrix : First, by the fact that the will was found in this condition a few hours after her death, in the iron chest in her bed room, in which she kept her valuable papers. This was unlocked, and the will taken out in the presence of Mr. Chetwood, and several other persons ; and it is proved by Mr. Chetwood, in whose custody it has been ever since, to be in the same condition as when taken from the iron chest.

Besides this, there are memoranda in the margin, one opposite each canceled part, signed with her name in one case, and her initials in the other, stating that she wished to *erase* these parts. These are in her handwriting. The canceling was clearly done by her.

A will, or any devise or legacy in it, can be revoked by canceling, as well as by a written revocation attested by two witnesses. The act of 1846, concerning wills, (*Nix. Dig.* 1028, § 2,) provides that no devise or *bequest* in writing, or any clause thereof, shall be revoked, otherwise than by some other will in writing, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his direction. Neither section sixteen of that act, nor the second section of the act of 1851, (*Nix. Dig.* 1032, § 25,) which enacts that all *written* revocations of wills shall be executed in the same manner as wills are required to be executed, affects this provision for cancellation of a devise, or legacy, or clause of a will. The memoranda in the margin, without the actual canceling, would have had no effect, as they are not properly attested. Their only effect is to show that the lines were drawn by the testatrix.

In England it has been repeatedly held that such canceling of a legacy by lines drawn by the testator, revokes the legacy so canceled, and does not affect the residue of the will. *Mence v. Mence*, 18 *Ves.* 350 ; *Martins v. Gardner*, 8 *Sim.* 73 ; *Francis v. Grover*, 5 *Hare* 39 ; *Larkins v. Larkins*, 3 *B. & P.* 16 ; *Short d. Gastrell v. Smith*, 4 *East* 419 ; 1 *Jarman* 119 ; *In re goods of Woodward*, 2 *Prob. and Divorce Rep. (Law Council Rep.)* 206 ; *Rogers Ecc. Law* 1018 ; 1 *Redf. on Wills* 307.

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The will, except the fifth clause and the part of the sixth clause which is canceled, must be admitted to probate.

The residuary legatee in this case claims the administration as matter of right, the only executor named in the will having died before the testatrix. The seventh section of the act concerning executors and administrators (*Nix. Dig.* 303), provides that if any person die intestate, or the executors named in the will neglect, for forty days, to prove the same, then administration of the goods of the intestate, or of the estate of such testator, with the will annexed, shall be committed to the widow or next of kin, or some of them; and if none of them will accept, then to such proper person as will accept. These are essentially the same as the provisions in the statute of 8 *Jac.* 1, *ch.* 5. Neither provide for the case where the executor dies before the testator.

Yet in England all the courts and authorities, and the writers on ecclesiastical and testamentary law, agree in holding that not only in cases where executors die before the testator, but in cases where they renounce or neglect to prove the will, which are directly in the provisions of the statute, administration with the will annexed must be committed not to the next of kin, but to the residuary legatee where there is one. This is done on the same principle that the administration of the estate of an intestate is committed to the next of kin. In each case it is committed to the person most interested in the proper administration of the estate. *Toller on Ex'rs* 99; *Wentworth's Office of Ex'rs* 487; 1 *Williams on Ex'rs* 403 and 404, *n.* 1; *Cootes' Probate Practice* 47; *Rogers' Ecclesiastical Law* 1039, *n.* a, and 1043; *Linthwaite v. Galloway*, 2 *Lec, Ecc.*, 413; *Taylor v. Diplock*, 2 *Phill.* 261; *West v. Willby*, 3 *Phill.* 374; *Atkinson v. Barnard*, 2 *Phill.* 316.

In the case last cited, Sir John Nicholl held that a residuary legatee was entitled to administration in preference to legatees and annuitants, even where there was no prospect of a residuum. He held that, although it might appear that the estate would be better administered by the legatees than

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by the residuary legatee, the court had no discretionary power to prefer them to the residuary legatee, or, what was the same, that there was no precedent for the exercise of such power. He says: "The residuary legatee is the testator's choice; he is the next person in his election to the executor. The practice goes along with that preference;" and cites *Thomas v. Butler*, 1 *Ventris* 217, in confirmation of that rule.

These decisions of the testamentary courts in England have always been recognized as governing the courts of probate in this state; they are the only guide. When the testamentary courts there disregard the provisions of a statute, or the settled rules of the common law, they are controlled by the common law courts by writs of mandamus and prohibition. These courts have refused to interfere by writs of mandamus with the testamentary courts in granting administration to the residuary legatee. This rule must then be considered as the law in this state, that a residuary legatee is entitled to administration in preference to legatees, next of kin and creditors, and that it is not discretionary with the Ordinary or Surrogates to grant it to any other person than the residuary legatee, when he is willing and able to accept.

The question whether a corporation aggregate can be an executor or administrator presents the next difficulty. It is well settled that a corporation sole can be executor. The person who constitutes the corporation can take the oath and execute the office. The older authorities hold, or rather lay down, the rule that a corporation aggregate can be an executor. Later authorities seem to hold the opposite doctrine, though in substance they agree with it. They hold that a corporation aggregate cannot execute the office of executor, as it cannot take the official oath; but that in such case, administration with the will annexed will be committed to persons appointed by them for the purpose, who are styled syndics. *Swinburne on Wills* 5, § 1; *Wentworth Off. of Ex'rs* 39, n. 1; 3 *Bac. Abr.* 5, tit. *Executor*; 11 *Vin. Abr.*

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140; *Toller on Ex'rs* 30; 1 *Williams on Ex'rs* 199; *In re Darke*, 1 *Swabey & Tristian* 516; 2 *Redf. on Wills* 59, § 3.

So, when the king is appointed executor, as no suit could be brought against him, letters testamentary are not issued to him, but to a person appointed by him for that purpose. *Toller* 30; *Went.* 29, *n. a*; 4 *Inst.* 335.

The case of a corporation aggregate falls clearly within the principle of the king, and of a corporation sole. I think the case is stronger when, as here, the application is to commit administration to one of the corporators. All corporations consist of the natural persons who constitute them; these natural persons are the corporation, and there is no reason why they should not, like a corporation sole, have the executorship or administration committed to them individually. This is the view of Godolphin, who, when stating who may be appointed executors (p. 75, ch. 1, pt. 2, § 1,) says, "or many, joyntly representing one body, as a college, city, or other corporation." Any number of the next of kin may have administration jointly. When the corporators are too numerous, they may select one, or the Ordinary may, of his own choice, prefer any one, as in the case of next of kin.

The principle being established that the residuary legatee is in all cases entitled to the administration, and the difficulty of the execution of the trust being obviated by the course pursued in the case of the king, of a corporation sole, and of a corporation aggregate executor, I think that no discretion is left to me but to apply these settled principles to the case before me, and to grant the administration to one of its own number, named for that purpose by the residuary legatee.

If the authorities had led to the opposite conclusion, that a corporation aggregate, being itself unable to execute the office of administrator, has no right to have the administration committed to one of its members, or to some person appointed by the corporation to act for it, then, as the other legatees clearly have no right to have it committed to their

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appointee, as far as these two persons are concerned, neither would have any right, but the appointment of either would have been in the discretion of the Ordinary.

Such discretion, as in all cases of judicial discretion, must be exercised according to some principle, and not according to the personal preference or the caprice of the judge. And in a case like this, it should be guided by the principle that for centuries has controlled the testamentary courts in deciding the *right* to administration, even against the literal meaning of the words of the statute. It should be exercised so as to give the administration to the person selected by the residuary legatee, the party most interested in the conduct of the administration, to insure a careful and prudent administration. In many cases, and I presume in this, the other legatees will neither gain nor lose by a more or less prudent administration. The residuary legatee always must. And, therefore, the discretion of the judge ought to be exercised for the protection of the residuary legatee, where the person proposed is a proper, competent, and responsible person. In the present case, both persons are alike beyond exception in these respects.

Legatees, or their nominee, have no right to administration, in preference to next of kin. The residuary legatee has such right. And as in this case it appears by the will that there are next of kin, no administration could be granted to Mr. Chetwood until the next of kin had been cited, consented, or received notice. 1 *Williams on Ex'rs* 407; *Kooystra v. Buyskes*, 3 *Phill.* 531.

Administration, with the will annexed, must be committed to James A. Williamson, one of the corporators of Rutgers College, appointed by the corporation to receive it for them.

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

MARCH TERM, 1871.

O'BRIEN, appellant, and HULFISH, respondent.

1. A mere defect of title is no defence to a bill for the foreclosure of a mortgage given for the purchase money of the mortgaged premises.

2. But where the vendee has been defrauded, the court will not permit, in a proper case, the mortgagee to compel the payment of the money without deduction, if such fraud and resulting damage are made to appear in the proper mode.

3. Such fraud, when the vendee is not in a position to rescind, must be set up by a cross bill.

The bill in this case was to foreclose a mortgage. The answer stated that the mortgage was given to secure part of the consideration money, the premises being conveyed by deed with covenants of warranty, &c., and that the title was defective, inasmuch as the complainant owned only three-fifths of the premises. The answer likewise averred that

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during the negotiations leading to the purchase, both the complainant and his agent assured the defendant that the complainant had the entire title to the property, and that relying on such assurance, the defendant took the conveyance, and entered upon, and improved and built upon the premises. The answer also contained an averment that the defendant believed that the complainant and his agent, at the time they made these representations, knew that they were false.

Exceptions were filed to all that part of this answer which related to a defect in the title of the complainant, and the appeal was from the order sustaining such exceptions. There was also an appeal from the final decree in the cause.

The opinion of the Chancellor is reported in 5 *C. E. Green* 230.

Mr. Lytle and *Mr. P. D. Vroom*, for appellant.

Mr. Gifford and *Mr. Williamson*, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The cases cited in the opinion which the Chancellor read in this case, conclusively show that a mere defect of title is not a defence to a bill for a foreclosure of a mortgage given for the purchase money. This proposition has never, so far as I am aware, been judicially gainsayed, and, upon the argument before us, it was admitted to be the settled law.

The defence was rested on a different ground; the position being that the answer presented a fraud practiced on the defendant in the sale of this property, and that this circumstance varied this case from the class embraced within the general rule above denoted.

I think there is no doubt that where a sale of real property is effected by deceit, and a mortgage given for the whole or a part of the purchase money, relief in equity will be given to the party defrauded in a suit on the mortgage,

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whenever such course is necessary to reach a just result. Fraud, as a general rule, gives jurisdiction to a court of equity, and there can be no reason why, when the process of foreclosure is being used as a means of giving effect to a deception, such process should not be so restrained and controlled as to prevent an injustice. Where a vendee, being let into possession, discovered that a bad title had been fraudulently put upon him, it was decided in *Edwards v. M'Leay*, *Cooper's R.* 308, that he was entitled, although not evicted, to have the conveyance set aside and the purchase money returned. Upon this principle the present defendant, if in a situation to rescind, could require a return of that portion of the purchase money already paid, and a cancellation of this mortgage. It appears, however, that he has improved the property by building upon it, and that he, therefore, cannot undo the contract, but this circumstance cannot, in any degree, affect his right to the aid of the court. If it be true, as he asserts, that he has been cheated into an agreement to pay more for the title to this property than it is worth, a court of conscience will not permit the excess over what is justly due to be exacted. For it is quite a mistake to suppose that because the defendant has not been evicted he has sustained no damage. If the defendant should never be disturbed in the enjoyment of this property by those who own, as it is alleged, two-fifths of it, still, he must inevitably suffer a serious loss, for a perpetual cloud will rest upon his title, and his property will not bring, in the market, anything like its fair value. To the extent of this injury, he has a present claim for compensation, and based upon this ground an action at law would lie. Nor would an eviction be an essential to such a proceeding, for its effect would be merely to enhance the damages. So, too, on this same foundation of fraud and existent damage, equity would take cognizance of the matter, even while the person defrauded was in the undisturbed possession of the land. In cases in which there is no fraud, but a naked failure of title and covenants of warranty, there can be no relief in equity

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before eviction, or at least before a suit looking towards that result; and this is on the ground that until such event the vendee has sustained no legal wrong. A vendor who has warranted the title is not in default until after the vendee has been, either actually or constructively evicted, and, consequently, before a dispossession, it is entirely consistent with principle for a court of equity to permit the vendor to collect the full amount of the purchase money. But the case is different where a vendee has been drawn into a losing bargain by the false representations of the vendor; because, in such a juncture, a present injury has been sustained, and a present right of action exists. By force of such circumstances, the right to equitable relief becomes unquestionable, and it is often the preferable, and sometimes the only adequate mode. "It remains to inquire," says Mr. Butler, in his note to *Coke Litt., tit. Warranty* 384 a, "what remedy a person purchasing under a defective title has, exclusively of the purchaser's warranty or covenants, or where the title is subject to a defect which the warranty or the covenants do not reach. In every case where the seller conceals from the purchaser the instrument or the fact which occasions the defect, or conceals from him an encumbrance to which the estate is subject, it is a fraud, and the purchaser has the remedy of an action on the case, in the nature of an action of deceit. But a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very peculiar circumstances, charge his real assets. A bill in chancery, in most cases, will be found a better remedy. It will lead to a discovery of the concealment, and the circumstances attending it, and may, in some cases, enable the court to create a trust in favor of the injured purchaser." See, also, to the same effect, 1 *Fonblanque on Equity* 365. Assuming, then, the statements of the answer in the present suit to be true, the defendant could, before an ouster, sue at law for damages arising from the fraud in question, and, consequently, he has a clear right to relief, on the same ground,

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in a court of equity. It is a plain dictate of common justice that the complainant, under such circumstances, should be required, before receiving the money due on this mortgage, to indemnify the defendant, as far as practicable, for the loss which he has sustained, and also for his probable future loss, by reason of the alleged deception.

Thus far it does not appear to me that the questions involved in this case are open to any doubt.

But the really debatable point, and the one which was principally discussed on the argument, is, whether this defence of fraud can be set up in the answer, or must form the subject of a cross-bill. The defence was overruled upon exceptions to the answer, and it seems to me that this is the correct practice upon the assumption that the fraud cannot be taken advantage of by an answer, because, if as a defence it is altogether inefficacious, it is unmistakably impertinent. Everything is impertinent which can have no legal or equitable value or effect in the cause. If, then, the fraud in question could be presented on the record only in the form of a cross-bill, it was properly struck out from the answer as being irrelevant. The question, therefore, recurs: how must the alleged fraud be pleaded? I am of the opinion that it cannot be set up as a pure defence, as has been attempted in the answer now under consideration. In proof of this view we have, I think, but to analyze this bill and answer: the bill claims the money secured by the mortgage; the answer declares that the defendant was deluded into taking an infirm title, and asks to be dismissed from the court without paying the money, or any part of it. Now, it seems to me that if the effect of the fraud would be to dispense with the payment of this money, then this pleading would be correct. But this result does not follow from the fact of fraud, and the consequence is, the defendant cannot stand on this ground. The defendant, as he is not in a situation to rescind the contract, must seek to have his damages assessed, and such other relief as the circumstances may require; and this would not be interposing a mere

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defence to the complainant's demand of the money, but would be asking affirmative relief. In accordance with the strict rules of equity practice, assistance of this character can be obtained only by means of an original or cross bill.

This was the rule enforced in *Miller v. Gregory*, 1 C. E. Green 274, a case which, with respect to every essential, was similar to that now under review. It was a proceeding to foreclose a mortgage, and the defence was obtained by false and fraudulent representations whereby the defendant had been induced to purchase the mortgaged premises at a price greatly beyond their real value. This defence was overruled, Chancellor Green saying: "It draws in question the fairness and validity of the sale made by the complainant to the defendant, and seeks to impeach the contract on which the title is founded. These matters, if available at all as a defence to this suit, can only be drawn in question by a cross-bill. The complainant is entitled to the benefit of his answer to these charges of fraud." There can be no doubt that this case is so completely in point that it would have to be overruled if this court should adopt the doctrine that the present defence can be advanced in the form of an answer. The decision is of the greatest weight, and if I had any doubt on the subject, I should yield implicitly to its authority. But, as I have already remarked, the rule of pleading seems to me to be unquestionably settled, and I have found no case in which fraud in a sale of land has been set up in an answer, the defendant being in the undisturbed possession of the property. Upon the argument counsel likened the case of fraud to that of an eviction where a warranty of title exists, and it was said that such eviction could be set up in the answer. But the two cases are not alike; for, on the occurrence of an eviction, the facts are of a simple character, and the right of the defendant is to have a return of the purchase money, or a deduction according to a fixed standard; but, on the contrary, fraud gives rise to a counter claim, the amount of damages being wholly unliquidated and dependent on the circumstances of the particular

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transaction. It is true that since the statute authorizing the complainant to waive the verification of his answer by the defendant, the utility of the cross bill in cases of this kind has considerably lessened. The defendant cannot now be said to be entitled to the benefit of his oath as annexed to his answer on the question of fraud, and it may, consequently, be a subject for consideration whether the rule of pleading requiring a cross bill may not, in many instances, be advantageously relaxed. But this is a question which appeals for solution to the Court of Chancery alone, for a decision of that court, holding the parties to an observance of the established rules of pleading, cannot, certainly, with any propriety, be called in question here. And it should also be remarked that even if a cross bill could be dispensed with, still, the answer in the present case could not be regarded as sufficient, inasmuch as it does not raise the proper issue. The only point it has attempted to place in controversy is, whether the defendant is not absolved from the payment of the money due on the mortgage, in consequence of the fraud of the complainant. The true point for decision is, how much has the defendant been injured, and what means should be adopted for his protection? And this point the answer has not put it in the power of the court to adjudge. The defendant has not asked that his damages should be assessed, and in the absence of such asking the court has not the competency to adjust them. This answer, therefore, would be insufficient, even though a cross bill was not indispensable.

The interlocutory decree appealed from should be affirmed.

The final decree appears, from inadvertence, to have been irregularly entered. As the whole of the answer was not embraced by the exceptions, it would seem that the master's report should not have been confirmed without a rule *nisi*, and that the case should also have been set down upon the argument list. And even if the answer is to be regarded as altogether suppressed, the decree was entered at too early a period, as the statute gives to the defendant thirty days,

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after his answer is adjudged insufficient, to file a second or further answer. *Nix. Dig.* 110, § 31. But this irregularity cannot be taken advantage of here, as it is not comprised in the reasons contained in the petition of appeal. The error, however, is important in this respect, that it relieves this court from the apprehension that the defendant, having possibly a meritorious case, will be shut out from a hearing by a mere lapse in pleading. Upon an application to the Chancellor, this final decree will, doubtless, be set aside on account of the irregularity above referred to, and thus the way will be opened to put the case in such a course of pleading, by cross bill or otherwise, as will lead to the attainment of an equitable result.

As the case stands, the final decree must also be affirmed.

The affirmance in this court of both the interlocutory and final decree, should be without prejudice to an application on the part of the appellant to the Chancellor to modify, open, or set aside either or both of said decrees, so as to reach the merits of the case.

The whole court concurred.

ANDREWS, appellant, and STELLE, respondent.

1. A mortgagor, after his equity of redemption is sold, is not a necessary party to a bill for foreclosure.

2. If made a party, and he sets up the defence of usury, he has a right to appeal from a decree against him, because the decree would bar him from setting up the same defence to a suit on the bond.

3. It does not necessarily follow from the right of such defendant to an appeal, that a court of equity would refuse to appropriate the proceeds of the mortgaged premises to the satisfaction of the usurious security, at the instance of a party who has no interest in the fund.

The opinion of the Chancellor is reported in 4 *C. E. Green* 410.

Andrews' v. Stelle.

Mr. R. S. Green and Mr. Williamson, for appellant.

Mr. Ludlow and Mr. C. Parker, for respondent.

The opinion of the court was delivered by
VAN SYCKEL, J.

To the bill filed for the foreclosure of a mortgage given to the complainant, Andrews and wife, the mortgagors, set up in their answer two defences: First. That Stelle holds the mortgage in trust for the City Bank of Perth Amboy, an insolvent corporation, and that the receivers of the bank must be parties. Second. Usury.

Before the bill was filed, Andrews' equity of redemption in the whole of the mortgaged premises had been sold, and it is insisted that he cannot, therefore, set up the defence of usury in this case. Andrews, having no interest in the disposition of the mortgaged premises, is not a necessary party to the bill; and if that constituted the test, he would not be in a position to challenge the propriety of the decree. *Vroom v. Ditmas*, 4 *Paige* 526; *Cummins v. Wire*, 2 *Halst. Ch.* 73; *Brolasky v. Miller*, 1 *Stockt.* 807.

But the complainant made him a party and called upon him to answer, and if the decree of the court below is unreversed, it will bar the defence of usury which Andrews might otherwise set up to a suit on the bond, it being a judgment between the same parties with regard to the same subject matter. A decree, sentence, or judgment of a court of competent jurisdiction is conclusive in any future litigation of the same question, between the same parties or those claiming under them. *Gelston v. Hoyt*, 1 *Johns. Ch.* 543; *Ehle v. Bingham*, 7 *Barb.* 494; *Young v. Rummell*, 2 *Hill* 478; *Kingsland v. Spalding*, 3 *Barb. Ch.* 341. In *Morris v. Floyd*, 5 *Barb. S. C. R.* 130, the mortgagor being sued at law, pleaded usury, but failed to appear at the trial: *held*, that the verdict and judgment against him estopped him from interposing the defence in equity upon foreclosure.

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Andrews is, therefore, interested in the decree, and has a right to show that it is wrong, if he can, and escape from the estoppel it will create against him in a future suit.

But it does not necessarily follow that if he could succeed in charging the transaction with the vice of usury, that a court of equity would refuse to apply the proceeds of sale of the mortgaged premises to the discharge of the mortgage, at the instance of a party who has no interest at all in the fund to be appropriated. The burden is on Andrews to establish infirmity in the security. He testifies, from inference rather than from any positive knowledge, that the bank really made the loan to him. In this he is directly contradicted by the complainant, and two witnesses who know all about the contract.

The books of the bank, which are exhibited in support of the appellant, are not of such a character as to be reliable, and do not make it clear that the two memorandum notes, upon which Stelle drew the money which he loaned, have not been paid. The question as to the payment of those notes must be settled between Stelle and the receivers of the bank.

The defence of usury, so far as Stelle can be affected by it, has no better support. It is expressly denied by Stelle and the two Pattersons, and although there are some entries on the bank book which give color to Andrews' statement that he paid something in addition to legal interest for the forbearance of the money, the weight of evidence is against the allegation that Stelle was a party to, or knew of any such vicious agreement.

The only entries upon the books for interest paid are \$325, \$300, \$412.50 and \$582.50, amounting to \$1620; while the interest endorsed on the bonds, to August 1st, 1863, amounts to \$1625, or five dollars more than the aggregate of those sums.

In my opinion, the decree of the Chancellor should be affirmed.

The whole court concurred.

Condit v. Blackwell.

CONDIT, appellant, and BLACKWELL, respondent.

1. Tax deeds in Wisconsin, which omit the words "as the fact is" in the given form, are void.

2. In a contract of purchase and sale between attorney and client, or principal and agent, the burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney or agent, and in the absence of such proof, courts of equity treat the case as one of constructive fraud. In case of trustee and *cestui que trust*, the contract may be avoided at the option of the *cestui que trust*.

3. The application of the rule which measures the duty of an agent, makes this a case of constructive fraud.

The opinion of the Chancellor is reported in 4 *C. E. Green* 194.

Mr. W. S. Whitehead and *Mr. McCarter*, for appellant.

The bill in this case is filed for the re-conveyance by the respondent to the appellant, of a house and lot in the town of Orange, New Jersey.

The property in question was conveyed by the appellant to the respondent, by deed dated June 16th, 1865, for the consideration of \$6500, subject to a mortgage of \$2500; said deed containing full covenants of warranty and seizin.

The only consideration for this conveyance was the conveyance by the respondent to the appellant, by deed of even date, of 2550 acres of land in the state of Wisconsin. The consideration named in the last mentioned deed was \$100, and the deed contained only a covenant against the acts of the grantor and those claiming under him.

The appellant relies on the following general points:

1st. That the title to the lands which the respondent undertook to convey to the appellant, as the consideration for the appellant's conveyance, was void for two reasons:

1. That if respondent had ever had a good title to the lands, they had been sold for taxes, and the time allowed by the law of Wisconsin for their redemption had expired.

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2. That the respondent never had title, and that deeds such as those under which he held, had been declared void by the Supreme Court of Wisconsin.

Laws of Wisconsin, of 1854, p. 78; Rev. Stat. of Wisconsin, of 1858, p. 233; Laws of Wisconsin, of 1859, p. 27; Lain v. Cook, 15 Wis. 446; Lain v. Shepardson, 18 Wis. 59; Wakeley v. Mohr, Ibid. 321.

2d. That the appellant was induced to make the conveyance of his land in Orange by reason of actual fraud on the part of the respondent, and misrepresentations made to appellant, and by respondent's taking advantage of the fiduciary relation which existed between them.

3d. That the respondent, being a lawyer by profession, at the time of the exchange of the lands in question in this cause, was, and for some time previous had been, acting as the counsel for the appellant in regard to other lands of appellant in the west, and in regard to the payment of taxes thereon, and was also, at the same time, employed as agent by the appellant for the sale of the lands of appellant in Orange, which were conveyed to respondent, and that appellant relied upon respondent as his counsel and agent in this transaction.

4th. That the exchange was constructively fraudulent, by reason of the fiduciary relation which the respondent held to the appellant, and was therefore void.

1 *Story's Eq. Juris.*, §§ 310, 312, 315-316 a, and cases cited; *Story on Agency*, §§ 210-212; *Poillon v. Martin*, 1 *Sandf. Ch.* 569; 2 *Sug. on Ven.* 887-889, and notes; *Paley on Principal and Agent*, 33, and note 4; *Parkist v. Alexander*, 1 *Johns. Ch.* 394; *Davoue v. Fanning*, 2 *Johns. Ch.* 252; *York Buildings Co. v. MacKenzie*, cited in 2 *Johns. Ch.* 268; *Torrey v. Bank of Orleans*, 9 *Paige* 663; *Banks v. Judah*, 8 *Conn.* 146; *Copeland v. Ins. Co.*, 6 *Pick.* 203, and note; *Jackson v. Van Dalfsin*, 5 *Johns. R.* 43; *Central Ins. Co. v. National Ins. Co.*, 14 *N. Y. (4 Kern.)* 85; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 *Barb.* 134; *Reed v. Warner*, 5 *Paige* 656; *Ex parte Lacey*, 6 *Vesey* 629; *Ex parte Ben-*

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nett, 10 *Vesey* 398; *Tate v. Williamson*, 1 *Eq. Cas.* 528; 2 *Ch. Ap. Cas.* 56; *Kennedy v. Brown*, 11 *Law Reg.* 357; *Scott v. Gamble*, 1 *Stockt.* 235; *Huston v. Cassedy*, 2 *Beas.* 228; *Mulford v. Bowen*, 1 *Stockt.* 797.

5th. That in such a case the burden of establishing the perfect fairness, adequacy of price, and equity of the transaction, is thrown upon the agent or attorney.

Same authorities cited on the fourth point.

Mr. Blake and *Mr. C. Parker*, for respondent.

No fraudulent representations are proved by any witness except Condit.

His story is not corroborated by facts or circumstances.

Many of his statements are disproved by the other witnesses; sometimes, by his own testimony.

The *probabilities* of the case are with Blackwell, not with Condit.

Condit is thus shown to be an *unreliable witness*. And it is unnecessary to suggest the old maxim.

Blackwell's story is not only consistent with itself, but is corroborated in several very important particulars.

Even were Condit's story to be accepted as true, *he has not introduced any legal evidence of a defective title* to the lands in controversy. On the contrary—by his own showing—the title is good to the principal part of the lands. And whether such title be good or bad, the testimony shows clearly that Condit has received all that he bargained for—that he took the property subject to all possible contingencies of failure of title.

A case of this character (involving the personal reputation of a party) may not be decided upon presumptions; but, strictly, according to law and the evidence.

Fraud is never to be presumed; it must be clearly proved by the party making the charge. The presumption of law is always against bad faith. *Stewart v. English*, 6 *Ind.* 176; *Flint v. Jones*, 5 *Wis.* 424; *Turner v. Lambeth*, 2 *Tex.* 365; *Hubbard v. Turner*, 2 *McLean* 519; *Gould v. Gould*, 3

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Story C. C. R. 516; *Hildreth v. Sands*, 2 *Johns. Ch.* 35; 1 *Story's Eq. Jur.*, § 200; *Atwood v. Small*, 6 *Clark & Fin.* 232.

The opinion of the court was delivered by

VAN SYCKEL, J.

The object of the bill filed in this case is to set aside a deed for a house and lot, in Orange, made by Condit to Blackwell, and to compel a re-conveyance to Condit, on account of alleged fraud in the transaction. The consideration for said deed was the conveyance by Blackwell to Condit, of 2550 acres of land in Wisconsin, to which the former claimed to hold title under tax sales.

The deed executed by Condit bears date June 17th, 1865; the consideration specified in it is \$6500, and it contains full covenants, subject to a mortgage of \$2500. The deed for the Wisconsin lands bears the same date; the consideration named is \$100, and the covenants are only against acts of the grantor and those claiming under him.

It is insisted, on the part of the appellant, that Blackwell, at the time he made said conveyance, had no title to the lands in Wisconsin; and he is charged with fraud, both constructive and actual, in effecting the exchange. Blackwell's title rested upon a deed made to him by Edward B. Howell (who held under tax deeds), October 1st, 1861, for a portion of said lands, and for the balance thereof upon a number of tax deeds, each bearing date January 14th, 1862.

The tax laws of the state of Wisconsin for the years 1854, 1858, and 1859, were in evidence, and were referred to by the counsel of the respective parties on the argument of the cause. By the act of 1854, the form of the deed is prescribed (ch. 66, § 3); the same form is retained by the act of 1858 (ch. 18, § 153), and re-enacted by the act of 1859 (ch. 22, § 50). In the tax deeds to Blackwell, the words "as the fact is," which occur in two places in the given form, are omitted. The Supreme Court of Wisconsin have held that this omission is fatal to the validity of a deed.

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Lain v. Cook, 15 Wis. 446; *Lain v. Shepardson*, 18 Wis. 59; *Wakeley v. Mohr*, 18 *Ibid.* 321.

It also appears, by reference to these tax laws, that all these lands were subject to be sold, annually, for the non-payment of taxes subsequent to those for which they were sold to Howell and Blackwell; and unless redeemed within three years after such sale, the title of the subsequent purchaser would become absolute, provided his deed was recorded.

It is admitted that no taxes were paid on the 2550 acres after 1857, and that they were encumbered by taxes assessed after that date to the amount of several hundred dollars. Sworn copies, in evidence, of entries and records made in the books of the treasurer of the county of Vernon, show that, between 1857 and 1865, about 900 acres of said lands had been sold from Blackwell for non-payment of taxes, and that there are imperfections in the title to other 400 acres. These entries and records are required to be made by the said tax laws of 1858; and section 178, of chapter 18, which provides that they shall be *prima facie* evidence of the facts therein stated in all judicial proceedings in Wisconsin, entitles them to the same consideration in the courts of this state. The defects in the Blackwell title being thus established, the real question is, whether Condit has shown any claim to relief from the loss occasioned to him by such imperfections.

It is admitted by Blackwell that at the time of the exchange, and for some years previous thereto, he had been acting as attorney for Condit in paying taxes on other lands held by him in Wisconsin, and that he was also at the same time employed in the capacity of agent by Condit to sell the Orange property. This fiduciary relation thus existing between these parties, the validity of this transaction must be determined by rules of law which are not applicable to ordinary cases. The confidence which the relation of attorney and client begets between the parties, and the influence which the attorney thereby acquires, has led to a very close

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scrutiny of all transactions between them, and the law often interposes to set aside contracts which, between other persons, would be subject to no exception. In such cases, the burden of establishing the perfect fairness, adequacy, and equity of the negotiation is thrown upon the attorney, and in the absence of such proof, courts of equity treat the case as one of constructive fraud. 1 *Story's Eq.*, § 311. In *Gibson v. Jeyes*, 6 *Vesey* 278, Lord Eldon expresses the rule to be, "that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given his client all that reasonable advice against himself, that he would have given against a third person." In the case of trustee and *cestui que trust*, the rule goes to the extent of creating a positive incapacity on the part of the trustee to purchase the trust estate, and gives the *cestui que trust* power to avoid the conveyance at his option.

Whether the rule relating to attorney and client applies to this case, inasmuch as Blackwell was not Condit's attorney, but agent only *in hac re*, need not be discussed, because the same considerations pertain to contracts of purchase and sale between principal and agent, and they are not allowed to stand unless there is "the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition." 1 *Story's Eq.*, § 315. In *Lowther v. Lowther*, 13 *Vesey* 103, the Lord Chancellor says, "that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed." "The agent must conceal no facts within his knowledge which might influence the judgment of his principal as to price or value, and if he does, the contract will be set aside." 1 *Story's Eq.*, § 360 *a*. The transaction must be characterized by the utmost good faith. There must be no misrepresentation, and an entire absence of concealment or suppression of any fact within the knowledge of the agent, which might

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influence the principal; and the burden of establishing the perfect fairness of the contract is upon the agent. The following authorities support these propositions. *Story on Agency*, §§ 210, 211; 2 *Sug. on Ven.* 887-9, and note; *Parkist v. Alexander*, 1 *Johns. Ch.* 394; *Banks v. Judah*, 8 *Conn.* 146; *Central Ins. Co. v. National Ins. Co.*, 14 *N. Y.* 91; *Huguerin v. Basely*, 14 *Ves.* 273; *Lowther v. Lowther*, 13 *Ves.* 102; *Selsey v. Rhodes*, 2 *Sim. & Stu.* 41; *Fox v. Mackreth*, 2 *Brown's Ch.* 400. And in cases where the agent, without the knowledge of the principal, becomes the purchaser, at his own sale, the principal may, at his election, adopt the contract or not.

Was the conduct of Blackwell, in consummating this exchange, as detailed in his own testimony, characterized by that fairness which the law demands?

Blackwell admits, both in his answer and in his testimony, that, pending the negotiation, he told Condit that he had been admitted to practice as a lawyer in the state of Wisconsin, and that he was conversant with the laws of that state in reference to tax titles; in his evidence he says, that the strongest expression he used with regard to the validity of the title was, that he was satisfied that under the provisions of said tax laws, his title could be maintained. It is manifest, and Blackwell admits it in his testimony, that Condit relied entirely upon the knowledge and statements of Blackwell with respect to these titles, because he had not sufficient time to send to Wisconsin and have an investigation made for himself. As before stated, when these representations were made, Blackwell's deeds were not only void, but a large portion of the lands he claimed to hold under them, had been sold for subsequent taxes, and conveyed to other parties. Condit had a right to rely upon these statements, and having done so, Blackwell cannot shield himself by the allegation that he did not then know that the omission of the words "as the fact is," rendered his title void; having declared that he was conversant with the laws of Wisconsin, he cannot be permitted, in equity, to throw the loss occa-

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sioned by his imperfect title upon the appellant, by the averment that he did not know that his assertion was not true.

Aside from this consideration, a careful reading of Blackwell's testimony clearly shows that he did not make an open and ingenuous disclosure of material facts in connection with his title. He admits that he knew no taxes had been paid by himself since 1857; that he did not know whether any had been paid for him after that date; that he took it for granted that his lands had been sold for subsequent taxes, and that after the expiration of three years from such sale, the purchaser's title would become absolute as against him by the recording of his conveyance. The following extracts from his own testimony cannot be read without creating the impression that he at least failed to give Condit the full knowledge which he himself had of the uncertainty and risk of his tax titles:

Quest. Did you tell Condit that the taxes had not been paid since 1857?

Ans. I told him there were unpaid taxes upon the land; exactly what, I did not tell him.

Quest. Did you not know they had not been paid since 1857?

Ans. No; I did not.

Quest. Is that your only reason for not telling him?

Ans. I didn't tell him so, for I didn't know that such was the case.

Quest. Did you tell him that the taxes on these lands had not been paid for three years?

Ans. I told him there were unpaid taxes for previous years; I don't think I mentioned three years.

Quest. Did you tell him in that connection, or at any time, that you had paid no taxes on the lands since you purchased them?

Ans. I told him that I had paid no taxes, or but very few; and he asked me if I did not run the risk of losing the land from subsequent sales, by reason of the taxes being unpaid,

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and I said the only way to guard against that was by paying them.

He further states, that he took it for granted that his lands had been sold for subsequent taxes, but that he had never made any examination of his titles, and did not know whether any deed had been given which would affect them.

That Blackwell had a superior knowledge of the infirmity in his title, which, if he did not suppress, he artfully expressed in a way to quiet when he should have aroused suspicion, is manifest.

The rule of morals, which, in a court of conscience, measures the duty of the agent, required Blackwell to state not only that there were unpaid taxes, but that he did not know that any taxes had been paid in seven years; not only to state that the way to guard against the risk of losing the land was by paying the taxes, but to explain fully and explicitly that he had not examined, and did not know the condition of his title, and that it was more than probable that his lands, or some of them, had been sold from him beyond redemption.

In reply to a further question, requesting him to state—giving the language he used as nearly as he could—what he said in respect to his title, and the laws of Wisconsin in relation thereto, he says: “I told Condit how I had acquired the lands in connection with Howell—about Howell and myself dividing our interest in these lands; I gave him the principal points as fully as I could of the law bearing on such sales; gave him a statement of the proceedings of the principal steps taken in selling and conveying lands for taxes; the effect given by law to such sales and deeds. I remember making this statement almost in these words: I think they were that my own feeling was, that unless the judges before whom such case might come, should suffer themselves to be influenced by popular feeling, I could not see very well how any contested case could well go against the claimant of the land, and that I could not apprehend that the judges were likely to be so influenced. I talked very freely with Condit

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about the lands at that time, and told all about them that was to tell that I knew of.

That Blackwell desired and intended to impress Condit with the belief that the tax titles were valid cannot be doubted, and that his success in so doing resulted from the fact that he concealed what he should have disclosed is equally clear. With a tax title to two thousand five hundred and fifty acres of land, upon which he had paid no taxes for seven years, and which were subject to be sold from him beyond redemption in three years, he asserts that he made no inquiry during all that period in regard to the condition of his title; yet, in effecting the exchange, he assures Condit that if the judges of Wisconsin were men of integrity, he could not see how the claim under his tax titles could fail. If he was wholly unadvised in regard to the situation of his titles, he had no right to make this assertion; if he was advised, he was guilty of positive fraud.

It is insisted that when the exchange was made the agency had ceased, and that the moment the parties began to negotiate with each other, they occupied the position of principals; but it is obvious that the rules of law which restrain dealings between principal and agent, could have no existence if they ceased to apply the moment the parties commenced to treat with each other. There is no evidence of an agreement between them that the obligations which the agency imposed should cease, and that they would bargain about the subject matter, at arm's length, as strangers to each other.

Being satisfied that there was legal fraud in this case, which renders the agreement vicious, and that in equity Blackwell should not be permitted to derive any advantage from it, it is not necessary to discuss at length the question of positive fraud.

The Steele and Pierson transactions are open to criticism. And the fact that immediately after the exchange Blackwell permitted Condit to represent, in his presence, to Richards and to Lent and Brown, without contradiction, that the title

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to the western lands was good, is inconsistent with the denial which his answer contains of material allegations in the bill. It is also very difficult to reconcile with the belief that Blackwell was ignorant of the defects in his tax title deeds, the fact, that so soon after the exchange as August 8th, 1865, new deeds were taken to him, and a number of suits instituted in Vernon county to cure such infirmities. His attempted explanation of these circumstances is not at all satisfactory to my mind.

If the case of *The State v. Winn*, reported in 19 *Wisconsin* 304, is the law of that state, Blackwell could have compelled the clerk of the county board of supervisors, by mandamus, to execute to him the re-deeds; but a valid sale and conveyance of the lands for taxes under a junior assessment, cut off his title under an earlier tax sale, although his deed was later in date of execution. *Jarvis v. Peck*, 19 *Wis.* 74.

Neither can the aid of the judgments in Vernon county be successfully invoked to perfect his insufficient titles. The tax laws of 1859 declare who shall be barred by such judgments, and they could not in any wise affect purchasers of the same lands, at sales for taxes assessed subsequent to those under which they were conveyed to Blackwell; especially so, when as in this case, such subsequent purchasers were not made parties to the foreclosure proceedings.

In my opinion, therefore, the decree of the Chancellor should be reversed, with costs in this court and in the court below; and a decree should be rendered declaring the deed from Condit to Blackwell null and void, directing a reconveyance by Blackwell to Condit of the Orange property with covenants as against his own acts, free from any encumbrance by him created; and also that Condit is entitled to an account from Blackwell of the rents, issues, and profits of the Orange property since the 17th day of June, 1865, deducting therefrom taxes, repairs, insurance, assessments, and other (if any) legal charges against said property; Condit to re-convey to Blackwell any title he may have acquired to the Wisconsin lands by virtue of Blackwell's deed to him.

The whole court concurred.

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CONOVER, appellant, and WARDELL, respondent.

1. After acceptance of the deed for lands, possession taken, and payment of the purchase money, an action may be maintained where there is a mistake by omission or repugnancy in the description, and the deed may be reformed. *Quære*. Whether a bill for specific performance is the proper form?

2. A failure to disclose facts within the knowledge of the seller of lands, to constitute fraud, must amount to a suppression of such as he is bound, under the circumstances, in conscience and duty to disclose to the purchaser, and in respect to which he cannot, innocently, be silent. Where there is no fraud or mistake in such facts, a party may properly be remitted to his remedy at law.

3. The papers executed by the parties relating to the purchase and sale of land may all be used, and they settle the meaning of the descriptive words and names used in these dealings, in preference to any other construction. Parol evidence of such meaning must be rejected where the conflict is apparent.

4. Where there is a particular recital in a deed, and general words are afterwards inserted, the generality of the words shall be qualified by the recital. The rule *falsa demonstratio non nocet* applies where there is repugnancy, and in such case the first grant by certain description prevails over a subsequent and variant demonstration.

5. The terms "our homestead," "the Wardell farm," and "the premises which Henry Wardell died possessed of," used in the papers, will be controlled by the precedent particular description by metes and bounds, when followed by the words in the deed—"it being the same premises that Henry Wardell died possessed of, and it being hereby intended to convey to said Conover all the land and premises lying within the above boundaries." They will not be held to include several strips of land lying outside of the boundaries, which were formerly part of the Wardell farm, and which have been separated therefrom, and advertised for sale in lots.

Mr. W. H. Vredenburg (with whom was Mr. J. Parker),
for appellant.

The bill was filed to compel specific performance of an agreement to convey land. The prayer of the bill is, that defendants convey to complainant the "Wardell farm," situate in Long Branch, New Jersey, of which defendants, or any of

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them, were seized at the execution of the agreement, embracing several portions of the said "Wardell Farm," particularly described in said bill.

Complainant's right to relief depends upon construction of agreement to sell and convey, dated June 26th, 1865, executed by defendant's agent with complainant. The agreement should be construed in the light of the contemporaneous power of attorney, dated June 26th, 1865, executed by defendants to their agent, empowering him to sell.

The construction of the terms of those instruments must determine complainant's right to parcels of land in question. The rule is well settled, that their terms cannot be controlled or varied by *extrinsic* evidence. *Stoutenburgh v. Tompkins*, 1 *Stockt.* 332.

No fraud, accident, mistake, or surprise is alleged by defendants to exempt those instruments from this rule of construction.

The language of the power of attorney upon which a construction must be placed is, defendants authorize their agent to sell and convey, &c., *all our "Homestead Farm on Fresh Pond; Beginning at or near the Fresh Pond school-house, in the middle of the highway, and running easterly, as the ditch and fence now stands, to the sea or ocean," &c.*

The language of the agreement is, "all that tract or parcel of land lying and being on Fresh Pond, in Ocean township, county and state aforesaid, and *known as the Wardell farm*; and begins in the middle of the road leading from Long Branch to Fresh Pond, near the corner of the Fresh Pond district school-house, and runs easterly, as the ditch and fence now stands, to the sea shore," &c.

The defendants failed to convey to complainant certain parcels of land of which they were seized and possessed at the time of the agreement, and are now, and which *adjoined to and were parts of* their "Homestead or Wardell Farm" on Fresh Pond. They claim that they have conveyed all they were bound to convey by giving complainant a deed which, by courses and distances, describes a tract *less tahn*

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the Homestead or Wardell Farm (as it then existed), and leaves out the portions in question. The defendants say that all of the Wardell farm *south* of the ditch and fence referred to in power of attorney and agreement, still belongs to them, and they have a right to retain it.

The rule is, that the purchaser is entitled to have the contract specifically performed as far as the vendor can perform it. See 1 *Story's Eq. Jur.*, §§ 746, 751, 779; *Losee v. Morey*, 57 *Barb.* 561.

If the defendants were bound to convey to complainant all of the *Wardell Farm*, which they then owned, then the complainant is entitled to relief.

If they can fulfill the terms of their agreement by making their south boundary in accordance with the course of the ditch and fence, and *not* in accordance with their *true* south line, then the complainant is not entitled to relief.

The first rule of construction is, that the deed be taken most strongly against him that is agent or contractor, and in favor of the other party. 2 *Black's Comm.*, p. 380; *Co. Litt.* 36 a. *Verba fortius accipiuntur contra proferentem.*

The second rule of construction which complainant invokes is, that words used as an *additional* description will not vitiate anything sufficiently described before. *Goodtitle v. Paul*, 2 *Burr.* 1089; *Mason v. White*, 11 *Barb.* 173. "My farm at Bovington" means all my farm at Bovington.

The mistake in the power of attorney and agreement was the mistake of *defendants*, not *ours*. The defendants gave a *false description* of "all our Homestead Farm on Fresh Pond." That mistake, contradiction, and falsity in the instruments was *theirs*, not the *complainant's*, and ought not to injure complainant. It was the defendant's *falsa demonstratio* of what they had before sufficiently described.

The complainant had a right to believe the *monumental* description in gross, which could be most readily understood by him.

The complainant paid for the *whole* farm, not a *part* of it. No reservation or exception was made by defendants of

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any part of that "Wardell Farm" for themselves, and yet defendants claim now the right to reserve a part of said farm for themselves.

The expression used by defendants in power of attorney, "supposed to contain seven hundred acres," was calculated also to deceive complainant.

The principal laid down in 2 *Black's Comm.* 380 applies, that "doubtful words and provisions in a deed are to be taken most strongly against the grantor, he being supposed to select the words which are used in the instrument." See also *Bac. Abr., Grant* 1; *Dunn v. English*, 3 *Zab.* 126.

The defendants, by attaching a faulty description to what was sufficiently described before, could not thus impair the prior grant.

The ditch and fence line cuts off and leaves for defendants a part of "The Wardell Farm," as it is now, and was then, owned by defendants.

Under the authorities, the defendants are bound to convey to complainant all of that "Homestead" or "Wardell Farm" which they *then owned*; their subsequent description was false, repugnant, and contradictory to the first. See cases of *Cate v. Thayer*, 3 *Greenl.* 71; *Keith v. Reynolds*, 3 *Ibid.* 393; *Hobart* 188; *Lodge v. Lee*, 6 *Cranch* 237; *Thatcher v. Howland*, 2 *Metc.* 44; *Worthington v. Hylyer*, 4 *Mass.* 195; *Wheeler v. Randall*, 6 *Metc.* 529-532; *Black v. Grant*, 50 *Maine* 364; *Spiller v. Scribner*, 36 *Vt.* 245; *Cutler v. Tufts*, 3 *Pick.* 277; *Ela v. Card*, 2 *N. H.* 175; *Abbot v. Pike*, 33 *Maine* 204; *Drinkwater v. Sawyer*, 7 *Maine* 366; *Marr v. Hobson*, 22 *Maine* 321; *Pike v. Munroe*, 36 *Maine* 309.

Again: where two descriptions of land are conveyed, one by *name*, and the other by *metes and bounds*, or *courses and distances*, the grant will operate to pass the land according to that description which is *most beneficial to the grantee*. *Hawkins v. Hanson*, 1 *Har. & McHen.* 523; *Vance v. Fore*, 24 *Cal.* 435; *Hall v. Gittings*, 2 *Har. & John.* 112.

The complainant asks that the power of attorney and agreement be construed so as to be most beneficial to him.

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Where there are two clauses in a deed, of which the latter is contradictory to the former, then *the former shall stand*. See *Cruise's Dig.*, tit. "*Deeds*," ch. 20, § 8; 23 *Am. Jurist*, p. 279.

Another rule governing the construction of deeds containing conflicting descriptions, is that the description the least likely to be affected with mistakes is to be adopted. *Vance v. Fore*, 24 *Cal.* 435.

The description, "*All our Homestead Farm on Fresh Pond*," is capable of *no mistake*. But the description, "Beginning at or *near* Fresh Pond school-house, &c., and running easterly, as the ditch and fence now stands, to the sea or ocean," &c., is capable of mistakes. Because, the word "*near*" is *indefinite*. It might mean one yard or fifty, off from Fresh Pond school-house. Because, the word *easterly* is indefinite, and permits the course to run as complainant claims it. Because, the words "ditch and fence" are indefinite. They did not extend, by *one hundred and fifty yards*, to the sea. There were many other ditches and fences there such as these. *They* might take in the portions in dispute.

The case must be determined upon the *writings* between the parties.

Parol evidence that, at the time of the bargain, the parties were on the land, and that the defendants designated points upon alleged boundary line, is inadmissible. *Peaslee v. Gee*, 19 *N. H.* 273.

All parol evidence as to the directions defendants gave Morris about what land he should sell, was clearly incompetent. The defendants cannot contradict their power of attorney in that way. They cannot come in court to show they had a different *intention* from that expressed in their deed of authority to Morris.

If the parol testimony is admissible in the construction of these instruments, then we submit that the evidence shows the complainant agreed with Morris to buy "*all the land H. Wardell died seized of, not conveyed away at that time.*" The extrinsic facts and circumstances show that complainant is entitled to the relief prayed for in his bill of complaint.

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Mr. R. Allen, jun., and Mr. B. Williamson, for respondents.

The opinion of the court was delivered by
SCUDDER, J.

The facts in this case are set forth in the Chancellor's opinion (5 *C. E. Green* 266), and will therefore be stated again, and referred to, only so far as may be necessary to determine the points to be settled upon this appeal.

The particular prayer of the bill is for a specific performance of the contract between the parties, by the execution and delivery of a deed or deeds of conveyance for the "Wardell Farm," of which the respondents, or any of them, were seized at the time of making and executing said agreement; for giving possession thereof; and for the several pieces and parcels of said "Wardell Farm," which they have failed and neglected to convey to the appellant, and particularly mentioned and set forth in the bill of complaint; and to account for rents and profits. Added to this is the general prayer for relief.

It may be doubted, as was suggested on the argument of the cause, whether it is technically correct to frame the bill for a specific performance of a contract for the sale of land, after acceptance of the deed, possession taken of the premises, and payment of the purchase money under it. The form of the relief which should be stated and prayed for, would seem to be more properly to reform the deed, because of a mistake by omission, or for repugnancy in the description. If there has been such mistake made in the conveyance, by the rules of equity the deed may be reformed by correcting the mistake, so as to make it read as it should have done, and by directing a further conveyance to perfect the title. Or, if there is repugnancy, the court may determine which part shall prevail, and settle the intention of the parties according to established rules of construction. The strictly appropriate remedy, in either case, would seem to be to reform the deed. The complainant's case is either, that all

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the land is not contained in the deed that should be, or that it is included, but so expressed as to leave it of doubtful interpretation. He therefore asks for a correction and for possession of the disputed land.

But the point of the form of application is not material here, because, under the general prayer, the court may give such relief as is agreeable to the case made by the bill.

It appears satisfactorily in the evidence, and is scarcely controverted, that there was no fraud in the contract or in the conveyance, by misrepresentation or otherwise, except that the agent, Morris, during the negotiations for sale, did not disclose to the appellant that the respondents were the owners of the small gores and parcels of land in dispute, lying south of the first course in the deed; and that said Morris then stated that these had been sold to other parties. It appears that there had been a parol contract for the sale of these pieces of land before that time; that they had been in part occupied, at least, by one of the contractors, and were separated from the other lands by a fence and ditch; and Morris supposed they had been conveyed. The respondents, of course, knew that they had not been actually sold, but they had separated them from the balance of their farm, offered to sell them to others, and had made the above stated incomplete contract for sale. Suppose that Morris had known exactly these facts, and had stated them to the appellant instead of saying that they were sold, could he insist that they should be conveyed to him? And is it probable that with this knowledge he would have made it a condition of his purchase of the property? There was no specific value in these small lots, in connection with the property, and they can in no way be regarded as a material ingredient of the purchase. It is not every concealment, even of facts material to the interest of a party, which will entitle him to the interposition of a court of equity. The case must amount to a suppression of facts, which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot, innocently,

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be silent. This is within the exception, unless we hold that the man who, in conscience, regards that as sold which he has agreed to sell, is a fraud doer even in so stating. 1 *Story's Eq.* 204; *Nicholson v. Janeway*, 1 *C. E. Green* 285.

This is, therefore, not a case of fraudulent concealment, nor is it one of extraordinary damages and hardship, as made by the bill and the proofs. The complainant might, therefore, properly be remitted to his remedy at law if he have any grievance, unless there has been some mistake by omission in the description contained in the agreement, or in the conveyance.

The Chancellor, in his opinion, has shown very conclusively from the testimony, that there was no mistake in fact, because the respondents conveyed all that they actually intended to convey, being the land lying north of the southerly line of survey, the first course of the description contained in the deed; excepting thereout lands before conveyed to Riell and to the Long Branch Railroad Company; and that the appellant received all that he supposed he was entitled to at the time. He was on the land before the agreement and conveyance; the premises were mapped and surveyed, and these lines and boundaries, together with the title deeds, were put in the hands of Philip J. Ryall, a careful and accurate attorney, and the son-in-law of the appellant, for the purpose of examination and for preparation of the conveyance. This map, which is produced in evidence, shows the first course in the boundary exactly as it is described in the agreement and in the deed to the appellant.

The mistake, therefore, if any there be, must be in the construction which has been put on the terms used in the agreement to describe the land intended to be conveyed.

The appellant insists that, by the true and legal construction of the agreement, he is entitled to have a further conveyance of three lots of land lying south of the beginning course in his deed, because they were part of the Wardell farm at the time of the contract of purchase. As thus stated, this is a question of construction, and must be determined by

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the papers—the written evidence of the agreement between the parties.

At the commencement of the negotiations between the appellant and Morris, the agent of the respondents, the former insisted that the latter should obtain a written power of attorney for his greater security in dealing with him. This was done, and it is in evidence, dated June 26th, 1865. By it the respondents appointed Jacob W. Morris, of Long Branch, their lawful attorney for them, and in their name to sell, grant, and convey "*all our homestead farm on Fresh Pond, beginning at or near the Fresh Pond school-house, in the middle of the highway, and running easterly as the ditch and fence now stands, to the sea or ocean,*" &c., continuing to the last courses, which reads: "*thence westerly along Wardell's line to the Fresh Pond road; thence up said road southerly to where it began; supposed to contain seven hundred acres; reserving thereout say one hundred acres, sold and conveyed to a Mr. Riell, and to the Long Branch and Sea Shore Railroad Company,*" &c.

On the same day, June 26th, 1865, Morris, as attorney of respondents, and the appellant made an agreement in writing, that he, Morris, acting as aforesaid, for the consideration of \$30,000, would well and sufficiently convey to the said Arthur V. Conover, his heirs and assigns, on or before the first day of April then next (1866), "*all that tract or parcel of land lying and being on Fresh Pond, Ocean township, county and state aforesaid, and known as the Wardell Farm, and begins in the middle of the road leading from Long Branch to Fresh Pond, near the corner of the Fresh Pond school-house, and runs easterly as the ditch and fence now stand, to the sea shore,*" thence, &c., "*to the beginning; supposed to contain five hundred acres, be the same more or less; reserving through the same the right of way now deeded to the Long Branch and Sea Shore Railroad Company;*" adding, "*and is intended to convey all lands in the boundaries above mentioned.*"

By indenture, dated October 28th, 1865, the respondents

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conveyed to the appellant, for the consideration of \$30,000, "*all that certain farm and tract of land situate, lying, and being in the township of Ocean, county of Monmouth and state of New Jersey, beginning in the centre of the road from Lane's End to Raccoon Island, and near the corner of the Fresh Pond district school-house ; thence along the line of William West and others, north sixty-seven degrees and fifteen minutes east, twenty-five chains, more or less, to the Atlantic ocean ; thence northerly along the ocean,*" &c., "*to the beginning,*" &c., "*supposed to contain five hundred acres, more or less ; it being the same premises that Henry Wardell died possessed of, and it being hereby intended to convey to said Conover all the land and premises lying within the above boundaries, except only such rights and interests as were acquired by the Long Branch and Sea Shore Railroad Company by deed,*" &c.

By indenture of the same date, October 28th, 1865, but executed November 1st, 1865, Jacob W. Morris conveyed to the appellant, Arthur V. Conover, all his interest in said lands by the same description found in the deed. What was the object of this deed does not appear, except, as it was said on the argument, "for the abundance of caution." There is a clause, however, at the close of the description, which may have some significance in determining hereafter the true construction of the agreement and conveyance between the parties. It reads thus : "The above premises are known as the farm of Henry Wardell, deceased, and the widow and heirs of said Henry Wardell, deceased, have, by deed of even date herewith, conveyed directly to said Arthur V. Conover."

These four several papers between the parties, and concerning this subject matter, although not exactly contemporaneous, are so, substantially ; and all may therefore be used to ascertain the intent of the parties.

This intent is to be gathered from the papers, and parol evidence can only be received to ascertain the mind of the parties as expressed in writing, by facts locating the descriptions, and putting the court, as to such facts, in the position

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of the parties to the agreement. The parol evidence, therefore, which was introduced upon both sides, to show the intention of the parties by their declarations, at or about the time of the agreement and conveyance, must be rejected as incompetent. *Opdyke v. Stephens*, 4 *Dutcher* 83; *Fuller v. Carr*, 4 *Vroom* 157.

The great force of the appellant's argument was used to show that the descriptive words in the several papers were repugnant, and that the particular description must give way to the general, according to the maxim "*falsa demonstratio non nocet*." The rule invoked is thus stated: "As soon as there is an adequate and sufficient definition, with convenient certainty of what is intended to pass by the particular instrument, any subsequent erroneous addition will not vitiate it." *Broom's Max.* *490.

Or thus: "Where there is a sufficient certainty of demonstration, as in the case of a grant of all my messuage and farm called A B, no subsequent error in descriptive circumstances will vitiate the grant. Thus, if the grant be of all that my messuage or farm called A, now in the occupation of B, the farm called A will pass, although in point of fact the farm be in the occupation of C, and not of B; for the false demonstration by the name of the occupier will not vitiate the grant."

But another rule is equally applicable to this case, which is, that where there is a particular recital in a deed, and general words are afterwards inserted, the generality of the words shall be qualified by the recital; according to the maxim, *Verba generaliter restringuntur ad habilitatem rei, vel personarum*.

The numerous difficulties with which this subject is involved, will be found well illustrated in these several authorities. 2 *Pres. on Abs.* *205, &c.; 4 *Greenl. Cruise* *245, *270, *271, and note; *Broom's Max.* *501; *Stukely v. Butler*, *Hob.* 168; *Cutler v. Tufts*, 3 *Pick.* 272; *Sprague v. Snow*, 4 *Pick.* 54; *Mason v. White*, 11 *Barb.* 186; *Goodtitle v. Paul*, 2 *Burr.* 1089; *Lodge v. Lee*, 6 *Cranch* 237.

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It will be observed that the rule *falsa demonstratio non nocet*, applies where there is repugnancy; and in such case the first grant by certain description, prevails over a subsequent and variant demonstration, except in those cases where equity will relieve on the ground of mistake or fraud, which we have already considered. But a careful examination of the papers between the parties, has led me to the conclusion that there is no such repugnancy.

In the power of attorney, the land to be sold and conveyed is described as all our homestead farm on Fresh Pond, beginning, &c., giving the ditch and fence as the monuments of the southern boundary to the sea.

The agreement to sell, following, cannot exceed this description, which limits the authority of the agent. The principals can only be bound within the terms of the authority given, or so far as they have subsequently ratified it by the conveyance.

In the agreement the description is, all that tract or parcel of land being on Fresh Pond, &c., and known as the Wardell Farm, and begins in the middle of the road, &c., and runs easterly as the ditch and fence now stand to the sea shore, &c., running around by metes and bounds to the beginning; and adding: "*And is intended to convey all lands in the boundaries above mentioned.*"

It will be noticed that in this instrument the terms are varied from "our homestead" to "known as the Wardell Farm," and if the latter includes more land than the former, it is an excess of authority.

Again: in the deed it is described as all that certain farm and tract of land situate, &c., beginning at the centre of the road, &c., thence along the line of William West and others, north sixty-seven degrees and fifteen minutes east, twenty-five chains, more or less, to the Atlantic ocean, &c., running around the survey by metes and bounds to the beginning. It is proved in the case, that this first or southerly line of the survey, is the same indicated in the others by the ditch and fence. It is added, "it being the same premises that Henry

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Wardell died possessed of, *and it being hereby intended to convey to said Conover all the land and premises lying within the above boundaries, except,* &c.

To these different descriptions Morris has added in his deed of release, after a particular boundary according to the deed, "the above premises are known as the farm of Henry Wardell."

If there be repugnancy here, which is the one certain first description which shall prevail? Is it "our homestead?" That is not in the agreement, or in the deed. Is it "the Wardell Farm?" That is not in the power of attorney to the agent, and therefore without authority in the agreement, unless identical with "our homestead."

In the deed it is said to be "the premises which Henry Wardell died possessed of." This last expression, where it is used, follows the particular description by metes and bounds, and is qualified and restricted by express words to the boundaries included in the deed, which are said to be the intention of the conveyance. It is also false, because neither the homestead nor the Wardell Farm, at that time, were the same premises that Henry Wardell died possessed of, for several pieces of land taken off the farm had been conveyed since his death to other persons. The one certain description, which does not vary in all the papers, is the particular boundaries, especially this southern line in dispute; and it is manifest they were not used merely as a reiteration, or affirmation of preceding general words, but clearly indicate the intention, and designate the thing granted.

But, upon the testimony, there is no repugnancy. Whether it was the homestead or the Wardell Farm that was to be conveyed, it must be taken as it existed at the time of the agreement, and not as it was at the death of Henry Wardell in 1852. Part had been sold off after his death, and to that extent it is not claimed. What, then, was the homestead, or Wardell Farm, at the time of the agreement?

About fifteen years before the agreement, and within a short time after the death of Henry Wardell, the adminis-

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trators of his estate, with the concurrence of the widow and heirs-at-law, advertised the land south of this southerly line marked by the ditch and fence, for sale. Since that time it had been offered in lots at private sale. Valentine, Cook, and West, each of whom had bought a lot south of the southerly line, from Henry Wardell, in his lifetime, agreed to purchase a part of the lot adjoining theirs, from the heirs.

These circumstances, in connection with the particular description by the boundaries contained in all the papers, is satisfactory proof that the gore of seven acres and seventy hundredths, and the two other small pieces of land south of the beginning line, had been separated from the farm for the purpose of sale, and were so regarded by the Wardell family. If this be so, then the appellant has, in his deed, the very property intended by all the terms used in the description, and it would be both inequitable and illegal to give him more by implication.

In every aspect of the case, therefore, the appellant is not entitled to the relief prayed in the bill. The bill of complaint was properly dismissed, and the decree of the Chancellor should be affirmed.

The whole court concurred.

JUNE TERM, 1871.

McLAUGHLIN, appellant, and McLAUGHLIN and others,
respondents.

1. A widow who remains in the possession of the mansion-house cannot be required to account for the rent of such house in case she claims damage for the detention of her dower in the other lands of her husband.

2. In partition, where the widow consents to take a gross sum in lieu of dower, and then dies, the fact of her death cannot affect the valuation to be made of her interest in the lands. It is her expectancy which is to be valued, and not the actual value of her life estate as it has turned out to be.

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3. The right of the widow becomes vested by her consent, and her subsequent death cannot affect such vested right. The case of *Mulford v. Hiers*, 2 *Beas.* 13, followed.

4. *Held*, in this case, that at the time the widow agreed to take a gross sum, her life was of the value of the average of persons of her age in ordinary health, and that a decree must be made on that basis.

John G. McLaughlin died, intestate, on the 2d of May, 1861, seized of a number of houses and lots in Jersey City, in one of which he resided at his death. He left his widow, Abby Ann McLaughlin, and six children, his heirs-at-law.

Two of these children were minors at his death. Some of them were children of his widow, the others were children of his wife. The widow remained in possession of the mansion-house until her death on the 20th of August, 1868. Dower was never formally assigned to her. The administration of the personal estate of her husband was granted to her. By tacit consent of all the heirs who were of age, she assumed the management of the real estate, collected the rents, paid the taxes and repairs, and rented out such parts as it was necessary to rent.

The bill in this case was filed in the lifetime of the widow, for a partition, and for an account by her of the rents of the estate. The master reported that a partition could not be made without great injury, and that the property should be sold, and that the dower of the widow should be sold with the lands. The lands were all sold in the life of the widow, and all conveyed except one lot in Greene street, which, upon the refusal of the purchaser to comply with his contract, was ordered to be re-sold, and was re-sold after her death. On the 23d of June, 1868, the widow filed her petition, electing to accept a gross sum in lieu of her dower, and an order was made on July 7th, 1868, to refer it to the master to ascertain and compute the value of her dower. She had, in compliance with an agreement between the parties during the progress of the cause, rendered her account of the rents and profits of the estate, in which she charged five per cent. for collecting them, and claimed one-third as due

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to her in her right of dowress, but did not charge herself with the rent of the mansion-house, and the office on the adjoining lot, which had been occupied as such by her husband in his lifetime. It was also referred to the master to examine and state her account.

The master made a separate report upon each order of reference to him. In the report upon the order to state the account, he charged her with the value of the mansion-house from the death of her husband, or rather from May 1st, the day before his death. To this the complainant, as executrix of her mother the widow, excepted, claiming that as dower was never assigned, the widow was entitled by virtue of the statute, to remain in possession of the mansion-house and messuage attached, without rent, until dower was assigned.

The opinion of the Chancellor is reported in 5 *C. E. Green* 190.

Mr. W. A. Lewis and *Mr. B. Williamson*, for appellant.

Mr. Dixon, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

By the decree in the Court of Chancery, the widow of the intestate, whose property it was the object of this bill to partition, was charged with the rent of the mansion-house. It appeared in the case that, from the time of the decease of her husband to the period of her own death, which occurred pending this cause, Mrs. McLaughlin was in the possession and actual occupation of the house in which the intestate was living with his family at the time of his death. By the second section of the act relative to dower (*Nix. Dig.* 250), it is provided that until her dower be assigned to her, it shall be lawful for the widow to remain in and to hold and enjoy the mansion-house of her husband, and the messuage or plantation thereto belonging, without being liable to pay

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any rent for the same. The question then arises, is there anything in the facts of the present case which should deprive Mrs. McLaughlin of the privilege thus conferred on widows as a class?

The first ground of exclusion insisted on was, that, in point of fact, there had been an equitable assignment of dower. But the proofs, in my opinion, altogether fail to sustain this assumption. The facts were these: Upon the death of her husband, the widow remained in the homestead, and also took possession of the other houses which constituted the remainder of the real estate. She received the rents of these houses, and, from time to time, paid over two-thirds of such rents to the children of her husband. She paid no rent for the homestead, nor was any ever demanded of her. It does not appear that the subject of rent for the homestead was ever alluded to between her and the children. She lived there free of rent, and in her testimony in this case, she says she supposed she had the right so to do. From these circumstances, it does not seem to me possible to hold that, as an equitable inference, we are to understand that the widow and heirs intended that the former should take one-third of this homestead, and should account for the other two-thirds in the form of rent. The facts of the case are all opposed to such an implication, and the widow expressly testifies that she had no such understanding. Some of the heirs have been sworn, and they do not pretend that they had a different impression. The entire question is as to what was the intention of the parties to this transaction. The widow says she occupied rent free; that she supposed she had the right to do so; and no one contradicts either the fact, or her understanding of the affair. I am constrained to dissent from the conclusion that, from these circumstances, the equitable inference is that dower was actually assigned in the mansion-house to the widow, and was accepted by her. To the contrary of this, the proof seems to me to be clear that it was the understanding of all the persons interested, that the widow should occupy this house free of rent.

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But in the second place, the broad position is taken that, conceding no equitable assignment to have been made, still, the widow, as she claims one-third of the rents of the other lands, must account for the value of the part occupied by her.

After a careful consideration of the subject, I am satisfied there is no foundation for this doctrine. In my apprehension, it is clear that if this be the rule of law, this important provision of the statute in favor of the widow will, in many cases, be of no avail to her. By force of such a theory, it would be advantageous to her only in cases where her husband left no real estate besides the homestead. Nor do I perceive anything either in this statute, or in the general rules of the common law, out of which such a doctrine can be constructed. The statute certainly has no such aspect; its language is clear that the widow shall hold the mansion-house, &c., until her dower shall be assigned to her, free of rent. The privilege is given here in the most unqualified form. The proposition is, to annex to this grant a condition to this effect; that the widow shall pay no rent, provided she makes no claim to her dower in the other lands which her husband owned. Upon what principle is it that this clause is to be deprived of half its force? The purpose of the act is obviously to provide a home for the widow until her dower be assigned, as well as to put a compulsion on the heir to make the assignment. To require the widow to sacrifice to the extent of two-thirds of the rental value of the homestead, her dower in the other lands of her husband, would defeat, in many cases, both these purposes; for, in case the dower thus abandoned was equivalent to the rent of the homestead, she would gain nothing, and the heir would lose nothing, by her remaining in its occupation. The hypothesis in question appears to me opposed, as well to the purpose and spirit of this law, as to its language. Nor have I been able to harmonize it with any of the rules of practice on the subject of dower, or with the general principles recorded in the decisions. It was provided by Magna Charta, that "the widow

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should tarry in the chief house of her husband for forty days;" and it is clear from the books, that after the statute of Merton, which gave the widow damages for the detention of her dower, the widow was not required, when she made claim to dower in the other lands of her husband, to bring in and account for the value of the premises thus occupied by her during her quarantine. There is nowhere, as far as I have discovered, a suggestion of such a liability. And it is also to be observed, that there was no express declaration in the Great Charter that during her forty days the widow should be exempt from the payment of rent, but this result was implied from the provision, that she should have reasonable estovers or maintenance out of the estate. 4 *Kent's Comm.* 61; *Co. Litt.* 124 b. The clause of our act is but an amplification of this provision of Magna Charta, beneficially extending the term of the widow, and expressly declaring that she shall hold the premises free of rent. If, then, it is true, as I understand it is, that the widow, in the estimation of her damages, was not charged for her occupation of the homestead during her quarantine, it would seem to be out of the question to charge her for possession of the mansion-house by force of our statute. It is true that at common law, there were certain reprisals which were made from the damages of the widow, and among these sometimes was included a deduction on account of her occupation of some part of the property. I have no doubt of the propriety of such deductions. Their legitimate extent, however, appears to have been this: whatever part of the property the widow had been in the actual enjoyment of, was thrown out of the estimation of damages, and on the simple ground that from such property she had not been deforced of her dower. But this rule merely excluded the claim of the widow to recover the value of her thirds in the land during the time she had so occupied it; but it did not authorize the heir to set up a counter claim in the suit for dower, for the other two-thirds of the value of the premises so having been occupied. If the widow had occupied the land without the assent of the heir,

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she was a mere trespasser, and it was not competent for him, in the action of dower, to set off the damages thus sustained; and if, on the other hand, he had consented to such occupation, he had his action to call the widow to account. But in the action of dower, the effect of the enjoyment of the land by the widow was to estop her from saying that in such land she had been deforced of her dower, and on that account to claim damages. So whatever had been paid to the widow in part satisfaction of her dower, could be shown in mitigation of damages. This, according to my understanding, is the entire scope of the decisions and judicial intimations. The cases cited fall within this circumscribed rule. *Woodruff v. Brown*, 2 Harr. 246; *Keeler v. Tatnell*, 3 Zab. 62; *Hopper v. Hopper*, 2 Zab. 715. In the case of *Nevill v. Walker*, 1 Leon. 861, there was a judgment by default, and the widow, by force of it, had her dower assigned, and subsequently, on a writ of inquiry, the jury, instead of estimating the damages to the date of the assignment of dower, by mistake, embraced the period between that time and the taking of the inquisition. The decision was to the effect that the widow could not claim damages for that portion of the time she had actually been in the enjoyment of her dower under the judgment of the court; a decision which certainly has no bearing upon the question under consideration. But I further remark, that even if it had appeared that, by the principles of the common law, a deduction was to be made from the damages to be awarded to the widow, to the full value of the lands occupied by her, it would not have shown that such course was proper under the operation of our statute. The effect of the rule would have been to make her pay full rent for the land occupied by her; but our statute declares that she shall not be charged with the rent of the homestead. To apply, therefore, such a rule to the widow's occupation of the "chief house of her husband," would be to expunge the statutory provision.

I think, from these considerations, that the widow could not be charged with any rent for her occupation of this man-

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sion-house. The decree should be corrected in this particular.

And it also seems to me that the second exception to the decree is well taken.

The widow elected to have a gross sum in lieu of her dower. After making this election, and before its value had been ascertained, she died. The master, in estimating the sum that should be allowed the representatives of the widow, considered and acted on the idea that the value of her life was settled by its actual duration. The Chancellor held that this calculation rested on an erroneous principle. The fact is, the master appears to have misapprehended the nature of the interest or thing which the widow agreed to have appraised. The thing to be appraised, and with which the widow parted, was not the value of her real interest in the land, but the value of her expectancy. It was this that the heirs had sold, and it was this that was to be estimated. In *Mulford v. Hiers*, 2 *Beasley* 13, the rule was introduced, that where, after the sale of the premises in partition, the widow agrees to accept in lieu of her dower such a sum as the Chancellor shall deem reasonable, and dies before distribution, by such consent the right becomes vested. This rule is too well established in the practice of the court to be now shaken. When, consequently, the widow signs such an agreement, she parts with her annuity for its estimated value, and the law raises the obligation on the part of the estate to pay such estimated value. The value of the widow's annuity at the time of such arrangement is the thing which in such cases is required to be appraised. The Chancellor, dissenting from the view of the master, adopted this rule; but he held upon the facts, that the life of the widow, at the point of time when her right became thus vested, was not a good one, and made a large deduction on that account. I have been unable to satisfy myself that this conclusion is justified by the evidence. It seems to me that the testimony conclusively shows that the widow's life was, at the time in question, an insurable one. The three phy-

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sicians who were examined say so; and I can perceive no evidence of an opposite tendency. This widow's life, in my opinion, should have been calculated on the basis that her life was of the value of the average of persons of her age in ordinary health. The decree should be also reformed in this respect.

Let the decree be reversed, but without costs.

CLEMENT, DEPUE, KENNEDY, LATHROP, OGDEN, OLDEN, SCUDDER, VAN SYCKEL, and WOODHULL, JJ., concurred.

Judge BEDLE also concurred, except as to the insurable character of the widow's life. In this respect he voted to affirm the decree of the Chancellor.

WALKER, appellant, and HILL'S EXECUTORS and others,
respondents.

1. The general rule is, that the competency of a witness is determined by his *status* when he is sworn and examined.

2. By the act of March 27th, 1866, (*Nix. Dig.* 1045,) a party in a representative capacity may be admitted as a witness in his own behalf; and if so admitted, the opposite party may in like manner be admitted as a witness. If, in an action in which the executor of a deceased is a defendant, the complainant offers himself as a witness and is examined in his own behalf before the defendant has been sworn in his own behalf, the complainant is not a competent witness when sworn; and his deposition will not be made competent by the fact that the defendant is subsequently examined in his own behalf. But if the defendant intends to exclude the complainant's deposition, he must move to suppress it, accompanied by an offer to withdraw his own deposition. If no motion to suppress is made, and at the hearing the defendant relies on his own deposition, he will be held to have elected to legalize the deposition of the complainant, which would have been legal if taken in a different order, and will be estopped from taking the unfair advantage of reading his own deposition and excluding that of the other party.

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3. An agreement by a purchaser at a sheriff's sale to purchase lands for the defendant in execution, and to hold the title obtained under the sheriff's deed for the benefit of such defendant, is an agreement within the statute of frauds; and, if merely by parol, will not be specifically enforced, except on the ground of fraud and oppression on the part of such purchaser, by means of which he has obtained the property of the debtor at an inadequate price, under the assurance of a contract to reconvey to him, or to hold the same subject to future redemption.

4. *Lis pendens* filed without any bill having been filed as a constructive notice, is a nullity.

5. A secret arrangement between a defendant in execution and a third person, for the purchasing in by the latter, of the property of the former at a judicial sale, upon a trust for the benefit of the defendant, the object of which is the present disposition of the debtor's property to avoid its subjection to execution and sale at the instance of other creditors, by means of which the property is bought in at inadequate prices, is contrary to the policy of the statute concerning fraudulent conveyances; and a court of equity will not grant relief upon such an agreement by compelling the purchaser to convey to the defendant in execution.

6. A deed, executed and acknowledged in this state by a sheriff for lands sold by him under execution, may be delivered in another state.

The pleadings and facts in this case are stated in the opinion of the Chancellor. Briefly, the case is this: The complainant, who is the appellant, prior to 1862 was the owner of certain lands in the county of Morris, consisting of a homestead farm, containing two hundred and eighty-two acres, and several lots lying adjacent thereto; together with personal property, comprising the furniture and library in the house, and stock of various kinds on the farm. The real estate was mortgaged to different persons for the principal sum of \$24,650, and encumbered by judgments against the complainant. Two of these judgments, amounting in the aggregate to the sum of \$3700, debt and costs, were in favor of Hill. In 1862 and 1863, the personal property and the complainant's equity of redemption in the lands were sold at sheriff's sale. At these sales, Hill became the purchaser of the lands, subject to the encumbrance of the mortgages thereon, and also of the greater portion of the personal property. Subsequently, the mortgages on the farm were foreclosed, on proceedings brought by one Atwater, who was

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the holder of the mortgage which was second in order of priority. At the sale by the sheriff under the foreclosure, Hill became the purchaser of the farm for \$19,999. The amount due on the mortgages, for debt, interest, and costs, at the time of the sale, was \$37,194.30. The sale under the foreclosure proceedings was made on the 12th day of September, 1864, but the deed was not delivered until the 5th day of September, 1866, and the delivery was made in the city of New York. On the 15th of September, 1866, Hill granted and conveyed to McAlpine the farm, and also all the personal property on it which he had bought at the sheriff's sale (except the library and library furniture), for the sum of \$28,000.

The charge in the bill is, that the several purchases by Hill, at the sheriff's sales, were made by him in trust for the benefit of the complainant after the payment of the debt due to Hill, and the encumbrances on the property. The prayer is, that the said trust may be declared, and the complainant be permitted to redeem; or, if necessary, that the property, real and personal, may be sold, and after payment of all legal and equitable liens, the balance realized may be paid to the complainant.

Separate answers were filed by Hill, George Walker, and McAlpine, and by J. D. Van Buren and Augustus Cutler, who were also made parties to the suit. Soon after the answer of Hill was filed he died, and the suit was revived against his personal representatives.

On hearing before the Chancellor, the bill was dismissed, and the appeal is from the decree of dismissal.

The opinion of the Chancellor is reported in 6 *C. E. Green* 192.

Mr. Vanatta, for appellant.

Mr. A. Mills and *Mr. C. Parker*, for Hill's executors.

Mr. T. Little, for McAlpine.

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The opinion of the court was delivered by
DEPUE, J.

The reliance of the complainant for the proof of his case is mainly upon his own testimony. It is insisted that his deposition was not competent to be read in the cause.

Hill died on the 7th of February, 1868. By his will, he constituted John D. Van Buren, Anthony B. Hill, John A. Hill, Joseph Dunderdale, George Walker and John A. Weeks, the executors thereof. The suit was revived against them by an order of revivor, made on the 22d of May, 1868. The examination of witnesses was commenced on the 14th of May, 1868, and the complainant was sworn as a witness in his own behalf on the 26th of June, 1869, under objection from the defendants' counsel.

Before the passage of the act of 1859, concerning witnesses, (*Nix. Dig.* 1044, § 34,) the complainant would have been an incompetent witness, for the reason that he was a party to the suit. By that act the disqualification arising from interest in the event of a cause, as a party or otherwise, was removed, with a proviso that no female should be admitted as a witness for or against her husband, except when the suit is between her and her husband; nor should any party be sworn in any case where the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in the cause sue or are sued in a representative capacity. By the subsequent act of March 27th, 1866, it is made optional with the party who is such in a representative capacity, to offer himself as a witness, and if he does so, he thereby renders his adversary also, a competent witness in the cause. *Nix. Dig.* 1045, § 35; *Shepherd's Executrix v. McClain*, 3 C. E. Green 128; *Hartman v. Alden's Executrix*, 5 Vroom 522.

When the complainant was sworn and examined in chief, none of the defendants who are parties to the suit in a representative capacity, had been sworn. He was not a competent witness then, and his incompetency disqualified all the parties on the other side from being sworn as witnesses

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in their own behalf, except such of them as were parties in a representative capacity. At a subsequent stage of the examination, Van Buren, George Walker, Anthony B. Hill, and Dunderdale, four of the executors of Anthony J. Hill, were examined as witnesses in their own behalf. The complainant was afterwards recalled, and again examined in his own behalf, strictly by way of rebuttal.

Neither of the depositions of the complainant was made competent by the fact that some of the personal representatives of Hill had, before the taking of the latter, been sworn in their own behalf. A party who swears and examines before the master a witness, who is, at the time of swearing, an incompetent witness, proceeds at his peril. He cannot by such a course be permitted to allure his adversary into a subsequent course of examination, that if precedent to his illegal proceeding would have removed the objection to his witness. Both these depositions would be suppressed if the conduct of the cause before the Chancellor, and at the hearing before this court, had not been such as to conclude the defendants from the objection.

The general rule is, that the competency or incompetency of a witness is determined by his *status* when he is sworn. The objection must then be taken. *Berryman v. Graham*, 6 C. E. Green 370. And if he is then a competent witness, his deposition may be read at the hearing, though in the altered situation of the parties, he would not be competent if called as a witness at the time his deposition is offered to be read. *Marlatt v. Warwick*, 4 C. E. Green 439. But the admissibility of parties as witnesses, when persons standing in a representative capacity are parties on the other side, rests upon peculiar grounds. The option is exclusively with the latter to make the former competent witnesses in the cause. That option must be exercised fairly. If, after the depositions have been taken on both sides, an application be made to suppress the deposition of the former, as having been taken at a time when he had not been made a competent witness by the action of the other side, it would be

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granted only on condition that the depositions of the personal representatives should also be withdrawn; or, if the condition imposed be refused, an order might be made for the re-examination of the party. It is the province of the court to so control the conduct of a cause and regulate its practice, that no unfair advantage is taken by either side in presenting the merits of the cause for decision.

To restore the English practice, so long disused in this state, of requiring all objections to the competency of witnesses to be made before the depositions are read at the hearing, would be impolitic. Neither can it be said that the defendants determined their election to admit the complainant as a witness by calling the executors of a co-defendant as witnesses in their own behalf—a course they were entitled to pursue, as a precaution against surprise in the event of the complainant's deposition being admitted for any purpose. But when the party with whom alone the objection lies—who is himself a competent witness, and, by his own examination as a witness, may remove the disqualification of the other—makes no motion to suppress the deposition of the latter, accompanied by an offer to withdraw his own deposition, but on the contrary reads his own deposition, and relies upon it at the hearing, he will be held by such course to have elected to legalize the deposition taken on the other side, which would have been legal if taken in different order, and will be estopped from taking the unfair advantage of reading his own deposition, and excluding that of the other side.

Under the circumstances of this case, we think that the depositions of the complainant are competent to be considered on the hearing of the cause.

The complainant relies on a parol agreement with Hill to purchase his property at the several sheriff sales in trust for him, to hold for his benefit, upon being reimbursed the moneys lent by Hill to the complainant, or paid for his benefit in satisfaction of encumbrances, and the payment of the two judgments Hill had against him. By the bill, an

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answer under oath is waived. Hill's answer, therefore, is not to be regarded as evidence in his own behalf on final hearing, but we may, nevertheless, look into it to see what issues are presented by the pleadings. He denies that he purchased the property, real or personal, or any part thereof, in trust or in confidence, express or implied, for the benefit of the complainant. With respect to the sale of the real estate under the Atwater foreclosure, he affirms that the sale was made for the purpose of having settlements made and debts paid, and that he bid on the property, and intended his purchase for and in the name of George Walker, the principal creditor of the complainant, who was then absent from the country.

The defendants having denied the existence of any agreement whatever with respect to the purchase of the lands, are entitled to the benefit of the statute of frauds without pleading it as a defence. The effect of a total denial of any contract is to put the complainant to proof of the trust, by legal and competent evidence, which by the statute is required to be in writing. *Van Duyne v. Vreeland*, 1 *Beas.* 150; *Whyte v. Arthur*, 2 *C. E. Green* 521.

An agreement by a purchaser at a sheriff's sale to purchase lands for the benefit of the defendant in execution, and to hold the title which he obtains under the deed from the sheriff for the use of such defendant, is an agreement within the statute of frauds. Where the elements of the case are simply a purchase under a parol promise to hold for the benefit of the defendant in execution, such a transaction cannot be enforced either at law or in equity. The jurisdiction over transactions of this nature rests on the ground of fraud and oppression on the part of the purchaser, by means of which he has obtained the property of the debtor at an inadequate price, under the assurance of a contract to reconvey the property to him, or to hold the same subject to future redemption. *Merrit v. Brown*, 6 *C. E. Green* 401.

It is obvious that the contract which is relied on, must precede the sale. A subsequent agreement to hold lands,

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the title to which has already passed to one contracting party by means of a sheriff's deed, in trust for the benefit of another, is manifestly the creation of a trust in lands, and if made by parol, is directly within the prohibition of the statute of frauds. Such a contract is incapable of being sustained or aided by allegations of fraud, upon which ground alone the jurisdiction of equity rests. It is the precedent contract with the defendant in execution for a re-conveyance, and the fraudulent conduct of the purchaser in connection with the sale, which have enabled him to acquire the debtor's property at an unconscionable advantage, that the court seizes hold of as a ground of equitable relief. Fraud cannot be predicated of a mere refusal to perform a contract which has no legal vitality.

The bill of complaint does not charge that any distinct and explicit contract was made between Hill and the complainant, prior to any of the sales. The charge in the bill is, that the clear understanding between the complainant and Hill was, when said Hill purchased the personal property, and also when he purchased the real estate, that he would hold the same merely as security for the complainant's indebtedness to him; and when the complainant should pay such indebtedness, said Hill should have no further interest in any of the said property, but that the same should go to the use and benefit of the complainant and his other creditors, and that such was the intention of the said Hill. With the exception of allegations in general terms, that Hill purchased for the use and benefit of the complainant, and that the understanding was that Hill held for his benefit, the bill does not contain any other matter in relation to a contract between the parties. In the most ordinary case of a bill for specific performance, the bill must distinctly show that some contract was made, and set out distinctly and unequivocally that the parties contracted in definite terms.

In his testimony the complainant is more specific. He testifies that in the spring of 1862, finding it necessary to be absent a great deal on government business, he and Hill had

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a talk over matters, and the agreement was entered into that they would not have the executions which were upon the property "dangling along," but that they would have the property sold, and that Hill should bid it in, or cause it to be bid in, at the lowest possible sum, without reference to the executions, and hold it in trust for the complainant till he got ready to pay him, whether it was more or less. This arrangement had reference to the sale of the personal property and of the equity of redemption in the lands, which were then encumbered for very nearly their full value. The personal property was sold on the 2d of May, 1862, and the equity of redemption in the several parcels of land at three several times, the first of which was on the 25th of August, 1862, and the last on the 2d of February, 1863. The decree in the Atwater foreclosure case was not obtained until the 5th of April, 1864. Under this decree the farm, containing two hundred and eighty-two acres, which was subsequently conveyed to McAlpine, was sold. With respect to that transaction, the complainant says that an arrangement was made with Hill that George Walker should purchase the interest of Atwater in the decree, which was accordingly done, and that in May, 1864, he requested the property to be sold under it. The sale took place on the 12th of September, 1864. The complainant was not present at the sale, being then in the West. He testifies that before he went away, Hill said, if the property had to be sold he would bid it in and hold it the same as at the other sale. This is all the direct evidence there is on the subject. It comes from the mouth of the complainant alone. No reliance is placed on the testimony of Vanderbilt and Mrs. Gleason. The Chancellor's estimation of these witnesses is quite equal to their deserts.

The complainant, by waiving an answer under oath, deprived Hill of the benefit of his answer as evidence in the cause. Hill died before the examination of witnesses was commenced in the cause, and we have not heard his statement of the transaction between them. These circumstances

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have given the complainant an advantage over his adversaries, that admonishes the court to scrutinize his testimony carefully, and compare it with the other facts in the case, before we yield to it our convictions.

The parties interested in the decree in the Atwater case, were Atwater, to the amount of \$8625; Maria Walker, to the amount of \$7475; and George Walker in the sum of \$16,565. George Walker's claim was last in order of priority, and, by the assignment in the spring of 1864, he became the owner of Atwater's interest in the decree. The whole amount of the claims on the premises under this decree was about \$32,700, exclusive of interest and sheriffs' execution fees. Cutler was also the holder of a mortgage upon the farm and six outlying lots, for an unascertained sum, given to indemnify him against endorsements which he should make for the complainant. The sum due on this mortgage at the sale, in 1864, was about \$3000. About \$1400 still remained due Hill on his judgments. Making allowance for interest and sheriffs' fees, there was due on the several claims above mentioned nearly \$40,000, of which upwards of \$26,000 was due to George Walker, in his own right, and as assignee of Atwater.

Hill, in these matters, was the agent of George Walker, who was then living at St. Croix. He alleges that he purchased for George Walker to save his interests. His statement is confirmed by the testimony of Dunderdale and George Walker. The letter written by the complainant to Hill, on the 26th of May, 1864, shows a state of feeling between him and Hill that would make it quite unlikely that Hill would voluntarily consent to stand in the position of a trustee for him, or that the complainant, who was himself a lawyer, would place himself in Hill's hands, under a trust, without some distinct agreement as to the nature of the trust, and some means of proving it if Hill was disposed to deceive him. It was natural that Hill should purchase in the property to secure George Walker. It was unreasonable that in doing so he should clog his purchase with

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a trust that would most certainly embarrass the interests of his principal. It is possible that Hill's wishes were that the complainant should be indulged to any extent not incompatible with securing, as far as possible, the money which was due George Walker. Unless he was a guilty party to a fraudulent combination to defraud the creditors of the complainant, it is highly improbable that he would enter into any positive contract or agreement with respect to the future disposition of the property, which would be a violation of his duty to George Walker, whom he represented in the business.

Mr. Cutler's testimony, too, must be regarded as opposed to that of the complainant, so far as relates to the existence of any contract of the kind relied upon by the complainant. He was the brother-in-law of both these parties. He was the attorney of Hill in obtaining his judgments, and also the attorney of the complainant in all his legal business before this litigation. He appears to have been the trusted confidential counsel and friend of both these parties, as well as the agent of Hill, after the purchase of 1864, until the employment of Van Buren, in 1866. He was present at all the sales of the complainant's property. He did the bidding for Hill at the sale of the personal property and of the farm. That he was kept in ignorance of any arrangements that were made between Hill and the complainant, in matters in which they were mutually interested in relation to these sales, is incredible. He has put upon record, by his testimony, and by his letter to Mr. Hill, in February, 1867, the most unequivocal denial of any knowledge of any contract or agreement by Hill for the purchase of the property in trust for the complainant. Mr. Cutler was called as a witness by the complainant. An examination of his evidence unresistibly leads to the conclusion, that while it was understood that from the premises all the mortgages on the lands should be paid, no agreement whatever was made with the complainant that any interest on his part should remain in the premises after the sale. His testimony is, that the under-

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standing was that Hill was to take title to the property, and hold it for the benefit of the mortgagees; that the property was to be re-sold, and from the proceeds of such sale the mortgagees were to have their pay; that there were repeated interviews between Hill, the complainant and himself before the sale, and that they were all satisfied that the proceeds realized from a judicious sale of the farm would be sufficient to pay off the mortgages. The object the parties had in view would be subserved by a purchase for the benefit of George Walker: the deed being made to Hill to facilitate a re-sale, because of the absence of George Walker from the country. No motive could possibly exist for observing the form of a sheriff's sale, to create what was in effect a new mortgage in Hill, unless it was a device to more effectually cover up a fraud against creditors, which had been perpetrated in the sales of 1862 and 1863.

The object which Cutler understood the parties had in view in the purchase of the farm has, in fact, been accomplished. From the proceeds of the sale of 1866 the amount due Maria Walker, under the Atwater decree, was paid. The residue was received by George Walker, upon his interest in the Atwater decree, and the balance of his claim has been extinguished by a subsequent release. Hill, in his lifetime, became the owner of the Cutler mortgage, by satisfying the amount due to Cutler on it. No claim has been made under that mortgage, by Hill or his representatives, against the complainant. When such claim shall be made, it will be subject to the defence that it was satisfied by the understood purpose of the purchase of 1864.

It is insisted that the testimony of the complainant is confirmed by the proof in relation to his being permitted to have the beneficial use of the property until 1866, and the delay in taking the deed for the farm from the sheriff. The indulgence granted to the complainant is satisfactorily explained. George Walker, after his brother's death, had conveyed the farm to the complainant, as a gratuity, subject only to the mortgage which Maria Walker held. Hill was a brother-in-

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law, and, at the time of these transactions, a widower and childless. The case contains abundant evidence of their kindness to, and assistance of the complainant, and of his need for the aid they so generously extended. The delay in accepting the sheriff's deed is accounted for by the absence of George Walker from the country, and the fact that there was not in the situation of the property any immediate necessity for having the deed. The fact that Cutler was authorized to effect a sale of the property after the sheriff's sale of 1864, is quite as consistent with the desire to realize out of the property the means to discharge the mortgage indebtedness, as with the idea of a trust for the complainant.

Whatever view may be entertained with regard to the purchases of the personal property and of the equity of redemption in the lands, in 1862 and 1863, the overwhelming weight of the evidence is in favor of the allegation of Hill that the purchase of 1864 was for the benefit of George Walker, under an expectation that from a future disposition of the property the claims of the mortgagees would be satisfied, without any trust over for the use of the complainant.

In this view of the testimony in relation to the sale of 1864, the complainant has no right to relief as to the farm which was conveyed to McAlpine. But if a different view of the evidence had been entertained, McAlpine would be entitled to the protection of a court of equity. The contract to purchase from Hill was signed on the 21st of August, 1866. The complainant was at once made acquainted with the proposed sale. The deed was executed and delivered on the 15th of September, 1866, when the residue of the consideration money was paid. On the 30th of August, 1866, a *lis pendens* was filed in the clerk's office of the county of Morris by the complainant. No bill of complaint had been filed; and, as a statutory notice, the filing of *lis pendens* was a nullity. *Nix. Dig.* 112, § 57. But the defendants had such information of the existence of that paper as to make inquiry a duty. On the same day of the filing of the *lis pendens*, the solicitor of the executors of Hill wrote to the chancery office, making

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inquiry whether any bill had been filed. On the 1st of September, 1866, a reply in the negative was received, and the sale was proceeded with. The filing of the *lis pendens*, without any bill having been previously filed, was, in itself, a fraud, and when the parties interested in the proposed sale had sought the sources of information to which that notice legally led, and found that it was a sham, it ceased to have any effect as constructive notice, and they were entitled to conclude the sale without further search for information. On the 21st of March, 1867, the complainant procured from George Walker a release of all claims and demands, which included the balance due him upon the decree in the Atwater case. On the 2d of April, 1867, the notice of *lis pendens* was struck from the records of the Court of Common Pleas of the county of Morris, by the consent of the then solicitor of the complainant. The bill in this case was not filed until November, 1867. In the meantime, McAlpine was in possession, and had expended from \$6000 to \$8000 in repairs upon the premises. The release of March 21st, 1867, the complainant in his bill relies on, as an extinguishment of his indebtedness to George Walker, under the Atwater decree. It is a serious question whether the acceptance of that release was not a ratification of the sale to McAlpine. But aside from that, the circumstances which transpired before this bill was filed, and the delay in commencing this suit, were such as to make it inequitable to deprive McAlpine of the fruits of his purchase, and would extinguish whatever equity the complainant might otherwise have had to have the lands restored to him.

With respect to the purchase of the personal property in 1862, and of the equity of redemption in the several lots in 1862 and the spring of 1863, Hill makes no claim that they were purchased by him for the benefit of George Walker. All the personal property sold was purchased in the name of Hill, except some few articles, amounting to \$123. The gross amount of the sale was \$3089.72; in which was included the proceeds of the sale of the library and library

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furniture. The complainant testifies that the library and library furniture were worth \$8000, and the other personal property an additional \$8000. The equity of redemption in the farm, and in four outlying lots, containing about thirty-two acres, was purchased by Hill. For the former he paid the sum of \$20, for the latter \$34. The encumbrances by mortgages on these lands was \$28,500, exclusive of Cutler's mortgage. The condition of the stock is graphically described by Mr. Cutler, in his letter to Hill of March 24th, 1862. He says: "The property was worth last fall, at least \$2500, but sold to-day it would not bring \$1000. Some of the horses when down are so poor that they cannot rise without assistance." The sale was in 1862, when market values were much depressed. Sheriff Demott testifies that the sale of the personal property was a fair sale; that he knew of no step taken by any one to prevent the property bringing its full value, and that the articles sold as well as articles ordinarily do at sheriff sales. The Chancellor was of the opinion that there was no unusual sacrifice of the complainant's property at any of these sales; and I see no reason to dissent from his conclusions. The time for the sale was selected by the complainant, and there is no proof of the use of any fraudulent or oppressive means by Hill to obtain the complainant's property at a sacrifice.

But if we accept the complainant's version of the transactions between him and Hill in relation to these sales, he is not entitled to relief. On his own showing, the arrangement was prompted by a desire to place his property beyond the reach of other creditors, which was consummated by the sales which ostensibly put the title in Hill.

The allegation in the bill that his motive in having the property purchased in and held by Hill, was to prevent its being sacrificed by a forced sale, under disadvantageous circumstances, and to enable him, by a subsequent judicious disposition of it, to realize its fair value, in order to apply the proceeds in payment of his debts to effect his emancipation from debt, will not avail the complainant. The policy

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of the statute concerning fraudulent conveyances, will not permit a debtor, secretly, to become in effect the trustee of his property for the benefit of his creditors, retaining within his own control the option whether, and when, it shall be applied in payment of their demands. It is not essential, in order to bring a case within the operation of the statute, that there should be actual fraud in the sense of an intention, ultimately, to cheat the creditors of a defendant in execution out of their claims. Any device by means of a conveyance of a debtor's property, whether made directly by the debtor himself, or by the intervention of a sheriff's sale, which places it beyond the reach of creditors, upon a trust in favor of the debtor, with the intention to hinder or delay creditors, is in violation of the statute, and illegal. *Owen v. Arvis*, 2 *Dutcher* 23; *Servis v. Nelson*, 1 *McCarter* 94; *National Bank of Metropolis v. Sprague*, 6 *C. E. Green* 530.

There may be instances in which an agreement between a defendant in execution and a third party for purchasing in the property of the former, at a judicial sale, upon a trust for his benefit, may be sustained. But where there are other creditors, who are not parties to such an arrangement, and the combination is secret, and the motive which prompted it is the present disposition of the debtor's property to avoid its subjection to execution and sale, at the instance of such other creditors, in payment of their demands, whenever they see fit; and the sale is effected at the instance of the debtor, and his property by such means is purchased in at inadequate prices; the transaction is one which cannot receive the approbation of the court, without sanctioning practices, the tendency of which will inevitably be to encourage frauds upon creditors. A trust founded upon an agreement contrary to the policy of the statute of frauds, will not be enforced. *Servis v. Nelson*, 1 *McCarter* 94, and cases cited in *Marlatt v. Warwick*, 4 *C. E. Green* 439.

Where the proof is full to the point of a precedent contract to purchase in property for the benefit of the defendant in execution, and under such a contract his property has

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been obtained at the sale by the sheriff at inadequate prices, the court will, nevertheless, refuse to enforce the specific performance of the contract for redemption, if the transaction is of such a character as to affect injuriously the rights of creditors. *Merritt v. Brown*, 6 C. E. Green 401.

The sale of the personal property was effected by virtue of executions on the two judgments of Hill, and a judgment in favor of one Thompson. The Thompson judgment was for the sum of \$10,756. The sales of the equity of redemption in the lands were made under the same executions, together with executions upon six other judgments which appeared on the records as amounting to about \$3000. The Thompson judgment had been previously paid; and the complainant testifies that, in 1861, of the nine judgments on which these sales were made, none of them, except Hill's two judgments, and two judgments in favor of Bowen and Leddy, which amounted together to about \$1200, had any legal life. He further testifies that his embarrassments arose from the debts of others, for whom he was surety; that he himself forced the sale of 1862, and that his object was to place his property in safe hands, that he might enter the service of his country without incurring the risk of his property being sacrificed by any thing that might occur during his absence. Mr. Cutler also testifies that it became necessary to have the title of the personal property out of the complainant, because of subsequent judgments.

After the disposition of the whole of the complainant's property was effected, Cutler, in 1867 or 1868, purchased the judgments of Bowen and Leddy for twenty-five or thirty cents on a dollar.

It is impossible to conceal the real nature and purpose of this transaction. The Chancellor, in his opinion, declares it to be a clear case of fraud upon creditors, and his conclusion is fully justified by the evidence which the complainant himself has furnished. Upon such a case the complainant can have no relief.

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A further point was made by the complainant's counsel; that there had not been a legal delivery of the deed to Hill under the sheriff's sale of 1864, and that, consequently, his legal title had failed.

The proof is, that the deed was executed and acknowledged by Sheriff Demott, in his county, on the 19th of September, 1864, and was left with his successor, Sheriff Fairchild, with directions to deliver it on the receipt of the purchase money. It remained in Fairchild's possession until the fall of 1866, when, by arrangement with the solicitor of Hill, he took it to New York city and there delivered it to Van Buren, the attorney in fact of Hill.

The effect of this mode of delivering the deed is not within the issue made in this cause, but, nevertheless, the question has been considered by this court as a practical question of great moment. If the delivery of a deed in pursuance of a judicial sale, cannot be made in another state, the same reasons which make such delivery null, will equally invalidate the act if done in another county within the state.

In *Dean v. Thatcher*, 3 *Vroom* 470, this court held that the giving to the sheriff by the defendant in execution, in another county, a list of his property to be levied on, was a sufficient levy; the property being at the time within the county of which the officer was sheriff, although the sheriff never took the property into possession, or saw it.

After a sale by a sheriff in compliance with the law is made, it is his duty to make the necessary conveyance to vest the title accordingly. The performance of this duty is not an official act of such a nature that, if done without the county, it is void. The delivery of the deed in pursuance of the sale, is a mere ministerial act, which may be done anywhere, as may suit the convenience of the parties.

The decree of the Chancellor is affirmed, with costs.

The whole court concurred.

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HAUGHWOUT and POMEROY, appellants, and MURPHY, respondent.

1. Bill filed and subpoena served are necessary before a *lis pendens* becomes constructive notice to persons who shall acquire title from the parties to the suit, *pendente lite*.

2. The commencement of a suit in chancery is constructive notice, only as against persons acquiring title or an interest in the property in litigation after the suit is commenced. A person whose interest existed at the commencement of the suit, will not be bound by the proceedings unless he be made a party to the suit.

3. In equity, upon an agreement for the sale of lands, the vendee, after the contract, is regarded as the equitable owner, and if the vendor thereafter sells the lands, he is considered as selling it for the benefit of the first purchaser, and liable to account to him for the profits of the second sale: or if the second purchaser is a purchaser with notice of the previous contract, he may be compelled to convey to the first purchaser.

4. The defence of a bona fide purchase may be made by plea, in bar of discovery and relief, or by answer, in bar of relief only. Proof of the actual payment of the whole purchase money is essential to that defence, whether it be made by plea or answer. If the defendant has been paid part only, he will be protected *pro tanto* only.

5. Where the subsequent purchaser has accepted a conveyance, and paid part of the purchase money in good faith before notice of a prior contract, if the first purchaser wishes to enforce his right to a conveyance of the lands, he must seek his remedy promptly. He may lose his right to specific relief by a conveyance of the land, by laches, and be remitted to the unpaid purchase money as the only relief that will be equitable. By accepting an assignment of a security taken for such unpaid purchase money, he will be held to have affirmed the sale.

One Amidee Boisaubin, on the 24th day of September, 1863, entered into a contract in writing, with Haughwout, one of the complainants, to sell to him a tract of land situate in the county of Morris, called the Spencer woods, containing twenty-two acres, for \$200 per acre, and giving to Haughwout until the 1st day of March, 1864, to accept the proposition. In the latter part of February, 1864, Haughwout gave Boisaubin notice of his acceptance of the proposition. Boisaubin having refused to make conveyance of the prop-

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erty, Haughwout, on the 31st of August, 1865, filed a bill against Boisaubin to obtain specific performance of the contract, and on the 1st day of September, 1865, filed in the clerk's office of the county of Morris a notice of the pendency of the said suit, in compliance with the statute.

To the bill filed in that case Boisaubin filed his answer, and the cause coming on for hearing in the Court of Chancery on the pleadings and proofs, a decree was made on the 27th of March, 1867, in favor of Haughwout, that Boisaubin make conveyance to the complainant according to the terms of the said contract. *Haughwout v. Boisaubin*, 3 *C. E. Green* 315.

On the 10th day of August, 1867, Boisaubin, in fulfillment of the said decree, conveyed to Haughwout the entire tract called Spencer woods; and on the 14th of October, 1867, Haughwout conveyed the equal undivided one-half part of said tract to Pomeroy, the other complainant.

On the 7th of August, 1865, Boisaubin conveyed to Murphy, the defendant in this suit, three lots, which were parts of the Spencer woods, by a deed bearing date on that day, which was executed on the 7th or 8th of August, but not recorded until the 5th day of October, 1865. The consideration of the conveyance from Boisaubin to Murphy was \$600, of which \$400 were paid on the delivery of the deed, and the balance of \$200 secured by a mortgage payable on the 7th of August, 1866; which mortgage was acknowledged on the 19th of August, 1865, and recorded on the 15th of May, 1866.

The opinion of the Chancellor is reported in 6 *C. E. Green* 119.

Mr. Pitney, (with whom was *Mr. C. Parker*) for appellants.

Haughwout's title to the premises in question became perfect in equity on or about March 1st, 1864, when the option to purchase the Spencer woods was accepted by him, and the offer made to complete the contract. From that time,

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Boisaubin became a mere trustee of the legal estate for Haughwout, and the latter a trustee of the purchase money for the former.

Whoever took the legal estate from Boisaubin after that date, took it burthened with this trust, unless he took it under such circumstances as to entitle him to the position of a bona fide purchaser for value paid, before notice of the trust.

Complainants contend that defendant does not occupy such position, and ask a declaration to that effect. They do not ask for specific performance of the contract between Haughwout and Boisaubin; that has already been performed, and a conveyance made and executed by Boisaubin to complainants, including the premises claimed by defendant.

Complainants' chain of legal title is complete. What they ask is, that the court shall decree and declare that such title is paramount to defendant's as to the lots in question in this suit.

Complainants do not claim or ask for any part of the purchase money paid by Murphy to Boisaubin. Such claim is not within the scope of their bill. They disaffirm the sale from Boisaubin to Murphy, and claim the land itself.

Haughwout established his equitable title against Boisaubin after a fierce litigation. The only question in this cause is whether or not Murphy is entitled to the position of a bona fide purchaser for value paid, before notice of Haughwout's equitable title.

Constructive notice *in pais* is sufficient; that is, notice of such facts and circumstances as would excite the suspicions of a prudent man and put him on inquiry. We allege and prove distinct and direct notice, from three sources.

The notice from his counsel was quite sufficient. The doctrine that notice must come from the party claiming title is exploded. 2 *W. & T. Lead. Cas. in Eq.* (ed. of 1859) 157-60; *Curtis v. Mundy*, 3 *Metc.* 405; *Ripple v. Ripple*, 1 *Rawle* 386; *Jackson v. Caldwell*, 1 *Cow.* 641-2; *William-*

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son v. Brown, 15 N. Y. 354; Green v. Slayter, 4 Johns. Ch. 46.

The whole conduct of the man, and his evidence in both causes, prove that at the time he called on his counsel, the purchase of the lots was still *in fieri*, the transaction unfinished, his money under his control if not in his actual possession, and he debating whether to complete the purchase or not.

The notice of *lis pendens* was filed before Murphy repaid the \$400 to Boisaubin.

Murphy is estopped from setting up in this cause, that he was mistaken in his testimony in the other cause. In order to adjust the equities between Haughwout and Boisaubin, arising out of the peculiar circumstances of the case, it became necessary to inquire what portions of the land had been sold by Boisaubin to bona fide purchasers, without notice of Haughwout's equitable rights; such portions were to be excepted from Boisaubin's conveyance to Haughwout, and Boisaubin was to account to Haughwout for the price of the lots so sold.

The bill in this cause distinctly alleges that a subpoena to answer was issued and served in the specific performance suit. This allegation is not denied by the answer, nor are the complainants asked to prove it. It therefore stands admitted.

Under the present practice of answering without oath, the element of discovery is eliminated from the answer, and its office is simply to make an issue to ascertain which of the allegations of the bill are to be disputed, to be put in issue. And such as are not so put in issue, are admitted for the purposes of the suit.

It is proved that an injunction was issued immediately after the bill was filed, and served on Boisaubin. The record shows that he answered within the time required by law, and that the cause was proceeded in with diligence, and brought to a hearing. Under such circumstances, and a notice of

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lis pendens having been duly filed in the clerk's office, the issuing of a subpoena is an idle ceremony, and not necessary to make the recorded notice effectual.

The mere filing the bill with the clerk and taking no steps thereon, might be nugatory; but any means which result in bringing the defendant into court, and in the active prosecution of the suit, are sufficient.

The Chancellor's ruling is contrary to the letter and spirit of the statute (*Nix. Dig.*, p. 112, § 57,) and the understanding of the profession.

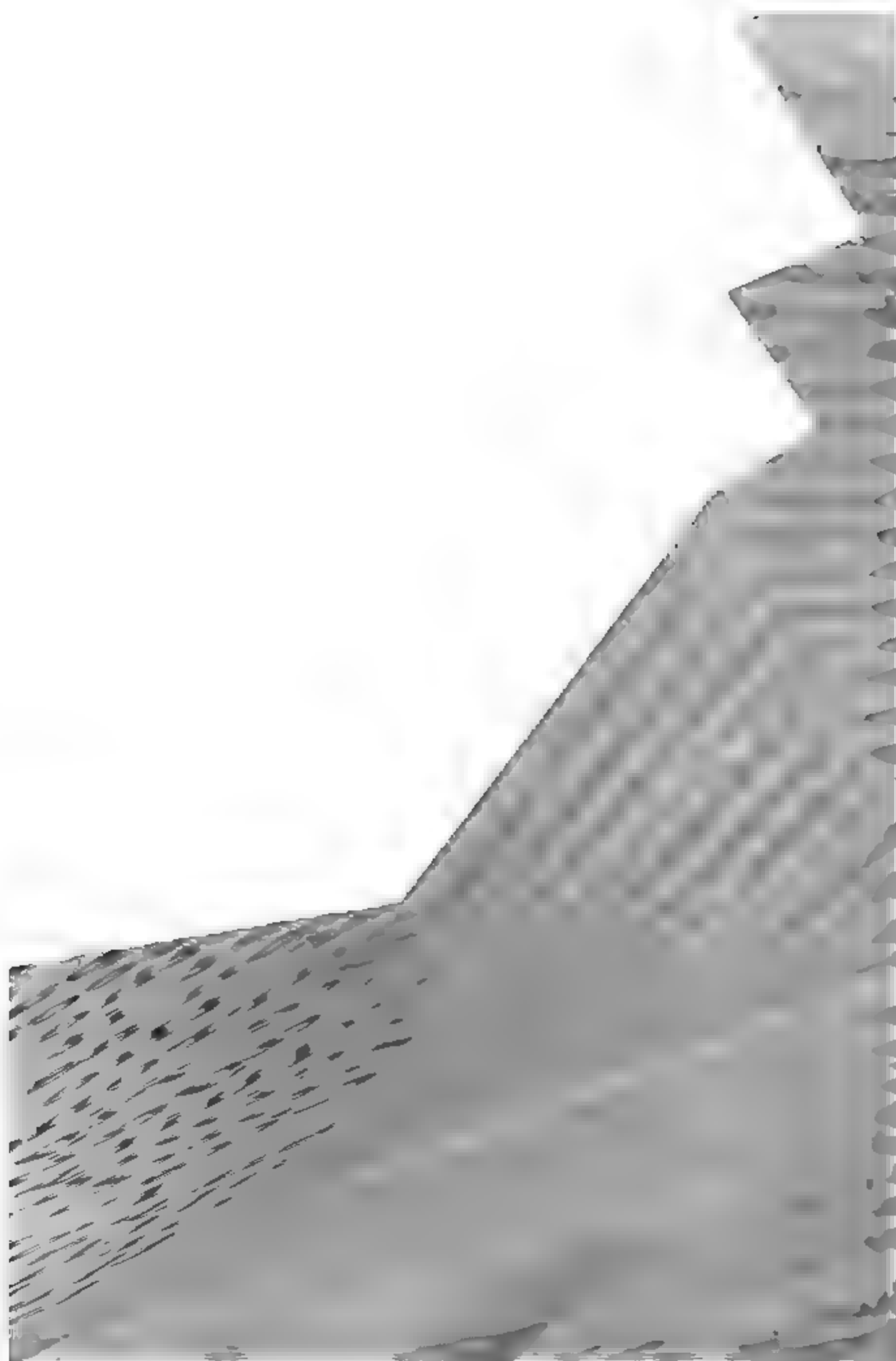
The prompt filing of the answer and diligent prosecution of the suit, raised a presumption that the subpoena was issued and served; especially as it was distinctly alleged in the bill, and not denied by the answer.

The true measure of protection to a bona fide purchaser for value paid, before notice, is *indemnity*. *Campbell v. Nichols*, 4 *Vroom* 87-8; *Holcomb v. Wyckoff*, *Feb. T.*, 1870, *Sup. Ct.*, not yet reported.

Having innocently dealt with a person clothed with apparent title, he is entitled to be made whole, *and no more*, by the real owner, before being dispossessed.

Murphy purchased from Haughwout's trustee, and took the property burthened with the trust. If he paid any money before he had notice of the trust, he will be protected to that extent. Whatever he paid before notice, he is entitled to have returned to him. The controversy is not as to whether complainants are entitled to any money from defendant, but whether defendant is entitled to any money from complainants as a condition to the relief prayed for. If he paid \$400 in good faith before he had notice of complainants' equity, he is entitled to have it returned by complainants.

Complainants do not affirm the deed from Boisaubin to Murphy, and claim the purchase money as unpaid; but they disaffirm it, and pray that it may be set aside, and the title under it be declared subsequent to theirs.



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The decree in *Flagg v. Mann*, 2 *Sumner* 566, referred to by the Chancellor in his opinion, was the result of the peculiar circumstances of that case, and of the prayer of the bill, which prayed for unpaid purchase money.

On the other hand, Judge Story says: "So the purchaser must have paid his purchase money before notice, for otherwise he will not be protected; and if he have paid a part only, he will be protected *pro tanto* only." *Eq. Jur.*, § 64 c.

And in *Wormley v. Wormley*, 8 *Wheaton* 421, 449, 450, he says: "It is a settled rule in equity, that a purchaser without notice, to be entitled to protection, must not only be so at the contract or conveyance, but at the payment of the purchase money. The answer of Castleman and McCormick does not allege any such want of notice. On the contrary, it is in proof that upwards of \$3000 of the purchase money was paid in the autumn of 1813 and spring of 1814, not only after full notice of the anterior transactions, but after the commencement of the present suit. It appears, therefore, * * * that Castleman and McCormick were not purchasers without notice of the material facts constituting the breach of trust, and that the *Frederic lands* ought, in their hands, to stand charged with the trusts in the marriage settlement." And such was the decree.

In *Jones v. Powles*, 3 *Myl. & K.* 581, 599, the defendants claimed title under a person in possession of an equity of redemption as devisee under a forged will, and were protected by a conveyance of the legal estate from a mortgagee of the original owner and alleged testator. The Master of the Rolls decreed the estate to the complainants, the heirs-at-law, upon payment to defendants of the sums (a part only of the purchase money) actually paid by them to the pretended devisee before notice of the forgery.

"It is essential to entitle the vendee to protection in England, that the purchase should have been brought to a conclusion by the payment of the whole of the purchase money, on the one part, and the execution of the conveyance, on the other; and relief will be denied if notice be given while the

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transaction is incomplete in either particular." *Basset v. Nosworthy*, 2 *W. & T., Lead. Cas. in Eq.* (ed. 1859), p. 101.

"In *Flagg v. Mann*, 2 *Sumner* 486, the court would seem to have entertained the opinion that *part* payment of the purchase money entitled the purchaser to the land itself, subject to a lien for the part unpaid, in favor of the holder of the antecedent equity which the purchaser had defeated. But it is plain, that as equity will afford a purchaser protection as against a vendor who has sold in fraud or in contempt of the trust, by enjoining the collection or compelling the surrender of a bond given or obtained for purchase money, *the right to relief*" (on the part of the subsequent purchaser) "*against the cestui que trust*" (the holder of the prior equity), "*must, in general, be limited to compensation and reimbursement for the amount actually expended on the land, or paid for it before notice.*" See 2 *W. & T., Lead. Cas. in Eq.* (ed. 1859), p. 117.

Lord St. Leonards, in 2 *Vend. & Pur.*, ch. 22, § 2, ¶ 16, says: "Notice, before actual payment of all the money, although it be secured and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before contract."

Chancellor Williamson, also, went on the principle of *indemnity* only to the subsequent purchaser, in *Campbell v. Campbell*, 3 *Stockt.* 277.

The plea in equity of bona fide purchaser for value was generally used as a protection against discovery, in aid of a claim of title absolute, and possession under it; and the fact that a portion of the purchase money remaining unpaid made the plea vicious, shows that a defendant under such circumstances could not escape and retain the land by simply paying over the amount remaining unpaid.

The rule adopted by the Chancellor gives the subsequent purchaser who has paid ever so little of his purchase money before notice of the claim of the prior purchaser, more than indemnity, viz., the benefit of his bargain; which is the

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very equity belonging to the prior purchaser, and which, in a case like this, he seeks by his suit in equity.

Where the dispute is simply which party is entitled to the profit of his bargain, the oldest equity, other things being equal, must prevail.

The principle upon which the Court decided *Campbell v. Nichols*, and *Holcomb v. Wyckoff*, also intervenes against the purchaser having the benefit of his bargain.

It is no relief in favor of a holder of a prior contract of purchase, and against a subsequent purchaser, to merely order the latter to pay the unpaid purchase money to the former.

Suppose A on the 1st day of April, contracts to convey to B on the 1st day of May, a tract of land at the price of \$10,000, to be paid on the delivery of the deed; and suppose on the 25th of April A conveys the land to C (who has no notice of B's contract), and receives cash \$1000, and bond and mortgage \$9000; and then, on May 1st, B tenders the money to A and demands conveyance, and at once files a bill in equity against A and C, praying that C may convey to him on payment of the \$1000 paid by C before notice; in the mean time the land turns out to be worth \$25,000; what sort of relief would it be to say to B, "C must keep the land and pay you the \$9000 of purchase money remaining unpaid?"

Of course B must at once hand the \$9000 over to A as purchase money, or rather he is not entitled to it at all; and so he would take nothing by his bill, and lose the profit and benefit of his bargain, which he was clearly entitled to as against C, by reason of his equity being older than C's, and which was the only thing in dispute between the parties. 2 W. & T. L. C. * 34, 35, note to *Le Neve v. Le Neve*.

The English rule, strictly carried out, refused *any* relief to a bona fide purchaser, unless he had paid *all* his purchase money; but, in this country, he was relieved to the extent of reimbursement of what he had paid in good faith before notice. 2 W. & T. L. C. p. 116; *Youst v. Martin*, 3 S. & R. 423; *Bellas v. McCarthy*, 10 Watts 13.

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Beck v. Uhrich, 1 *Harris* 636, was an issue to test the validity of a judgment for \$1500, recovered upon bonds given in part payment of purchase money of land which the vendor held in trust for himself and others as tenants in common. \$250 in cash had been paid before notice of the trust. The defence to the judgment was, that the judgment debtor had been notified of the trust before payment of the judgment. The court held this a good defence, and set aside the judgment; and said: "It is true that Beck paid \$250 to Uhrich, who was the *apparent* legal owner; and if he purchased without notice of the trust, he would have an interest in the land to *that extent*, for which he is *probably more than compensated by the rents and profits*." And again: "So far as an innocent purchaser is concerned, *he is protected so far as he has paid his money*."

Kunkle v. Wolfersberger, 6 *Watts* 129; *Beck v. Uhrich*, 1 *Harris* 640; *Patterson v. Brown*, 32 *N. Y. R.* 93; *Wells v. Morrow*, 38 *Ala.* 130; *Willard's Eq. Jur.* 298; *Dow v. Jewell*, 18 *N. H.* 343, 358; *Pickett v. Barron*, 29 *Barb.* 508; 3 *Barb. Ch.* 451; *Warner v. Whittaker*, 6 *Mich.* 135; *Brown v. Welch*, 18 *Ill.* 343.

After the \$400 had been handed back by Boisaubin to Murphy, and while the latter retained it in his possession, he stood as if no money had been paid. The Chancellor's view of the transaction is erroneous. The money was handed back as *purchase money*; it was the exact amount and identical money paid, and the object was to put Murphy in *statu quo*.

If he had refused to pay the second time, Boisaubin must have sued him for *purchase money*, and Murphy could have defended on the ground that there was a prior claim to the property, of which he had notice. 2 *W. & T. L. C.*, * 54 & 55, (ed. 1859,) p. 152, and authorities cited; *Jones v. Stanley*, 2 *Eq. Cas. Ab.* 685; *Wigg v. Wigg*, 1 *Atk.* 384; *Tourville v. Naish*, 3 *P. Wms.* 307.

Murphy having advised with Judge Dalrimple, and talked with Mr. Little, and heard Boisaubin's story, decided delib-

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erately, to pay the money and *keep the property*. "*I have bought it, I said, and I will keep it.*"

The whole case shows that he was willing to take the chances; and having so decided, he put his deed on record, and told Boisaubin to come for his money.

Having had actual and constructive notice of Haughwout's claim and the suit brought thereon, before he paid his money, and while there was ample *locus penitentiæ*, he must be held bound by the result.

If he thought he could make a better defence than Boisaubin, it was his right and duty to make himself a defendant to this suit, and not doing so, he is barred. *Finch v. Newnham*, 2 Vern. 216; *Landon v. Morris*, 5 Sim. 247; *Metcalf v. Pulvertoft*, 2 V. & B. 206, 207; 2 *Story's Eq. Jur.*, § 908, and note.

Haughwout had no notice of the deed to Murphy until after bill filed. The deed was not recorded, and no possession was taken under it until long afterwards, April, 1866; and Haughwout was not obliged to file a supplemental bill to bring Murphy in.

It is the settled rule of the court, that no notice need be taken by the complainants of parties coming in *pendente lite* under the defendant.

The position of the defendant is not strengthened by the payment of the \$200 mortgage. It was assigned to Davidson as collateral to Boisaubin's bond and mortgage, and the payment enured to Boisaubin's benefit only. His bonded debt was reduced so much thereby, and as a consequence, the decree for deficiency against him was reduced. The payment was purely voluntary.

Haughwout repaid to Davidson the whole sum, \$5800, with interest, advanced by him to Geoffrey.

The \$212 received by Davidson's solicitor from Murphy, was paid to Davidson individually; did not go into the cash of the partnership, and was entirely forgotten by Davidson until the check was shown him.

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The evidence shows that Mr. Davidson made the \$212 as a profit on the transaction, as he had a perfect right to do.

The rules which govern suits for specific performance in England, and require any prompt action on part of the complainant, have no application to this case.

Mr. Vanatta, for respondent.

I. The appellants failed to show that Murphy, before he paid his purchase money, had notice of their alleged equitable title.

The appellants base their claim on an alleged prior contract between Amidee Boisaubin and Haughwout, dated in September, 1863, (nearly five years before the bill was filed,) of which, as they say, Murphy had notice before he paid anything, and before he received any deed. This alleged notice is the foundation of their suit, and without it they have no case at all. The *onus probandi* is on them, and they must make it out clearly.

The answer fully denies the notice.

The warning given to Murphy by his counsel, of the contract between Boisaubin and Haughwout, was after Murphy had received his deed and paid \$400 of the purchase money. Moreover, all that was said to him was not enough to constitute notice. It was not sufficient to put him upon inquiry.

The sufficiency of the notice must always be judged of upon reasonable consideration of all the surrounding circumstances. 1 *Story's Eq. Jur.*, § 400 a. What is sufficient to set a lawyer, or an educated, intelligent business man upon inquiry, may not amount to a hint to an ignorant, inexperienced laborer. What counsel said to Murphy was calculated to allay fears and suspicions—to divert from, instead of leading to, further inquiry.

Murphy applied to his counsel for advice in their professional characters, because they were counselors-at-law, and because he wanted the advice of such counselors. For this reason, the evidence of both those gentlemen, as to notice to

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Murphy, is illegal, and should be excluded from consideration. 2 *Sug. on Ven. & Pur.*, ch. 17, p. 298; 1 *Greenl. Er.*, § 241.

Not only is the fact of notice not proved, but it is negatived.

Boisaubin handed back to Murphy, on the 19th or 20th of August, 1865, the \$400, not to rescind the sale, but as a special pledge for a special purpose, and as soon as the Brittin mortgage was canceled, Murphy's right to hold the money ceased.

II. Haughwout (before he conveyed a portion of the premises to Pomeroy) ratified Murphy's purchase and his deed, and waived all exceptions thereto.

The mortgage which Murphy gave Boisaubin for \$200, included the three lots in question, and on its face declared it was to secure part of the purchase money for those lots. In Murphy's evidence in Haughwout's suit, given 5th of April, 1866, he told fully what that mortgage was for. That mortgage was assigned to Davidson, (Haughwout's partner.) It was paid to Haughwout's solicitor. In substance and in fact, Haughwout was the owner of the \$200 mortgage, and received the money on it.

The money Davidson paid Geoffrey for the mortgages was really a loan to Haughwout. It was money paid for his use, and at his request, and on his guarantee; and when he paid Davidson he was entitled to all the mortgages. Haughwout and Davidson so understood and so treated it.

That the \$200 mortgage was assigned as collateral, is immaterial. The point is that Haughwout, or his agents, took the money from Murphy, knowing that he paid it as the balance of the purchase money for the land in question. It does not appear that Haughwout did not keep Murphy's \$200. There is no pretence that he paid it to Geoffrey or Boisaubin.

After taking the pay for the land, he cannot now take back the land and keep it also. He cannot have the purchase money and the land, both.

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If the landlord evicts his tenant, he cannot thereafter collect rent. And if the tenant holds over, and, while holding over, the landlord receives rent for the future, he cannot then evict the tenant. He cannot enjoy the land and the rent too. When he accepts the one he relinquishes the other.

If Murphy had notice of the alleged equity of the appellants before he paid the \$400, the receipt of the money for the mortgage was a ratification of Murphy's purchase, and a waiver of all objections to it. *Scott v. Gamble*, 1 Stockt. 218; *Van Doren v. Robinson*, 1 C. E. Green 262; *Chesterfield v. Janssen*, 1 Atk. 301; *Beresford v. Archbishop of Armagh*, 13 Sim. 643; *Butler v. Haskell*, 4 Dess. 709; *Campbell v. Fleming*, 1 Adol. & Ellis 40.

III. The appellants, by reason of acquiescence and laches, have no right to specific performance.

See *Van Doren v. Robinson*, 1 C. E. Green 262; *Dorin v. Harvey*, 15 Sim. 49.

The case now before the court, like *Van Doren v. Robinson*, is an unilateral contract. In all such cases laches are fatal. *Fry on Spec. Perf.*, § 733; *Watson v. Reed*, 1 Tamlyn 381.

In short, whenever the acts or omissions of the plaintiff have been such that specific performance will be inequitable, the court will refuse it.

The opinion of the court was delivered by

DEPUE, J.

The bill of complaint filed in this cause, after setting out the proceedings in the suit in chancery between Haughwout and Boisaubin, charges that the deed of conveyance from Boisaubin to Murphy, though bearing date on the 7th of August, 1865, was not actually delivered until the 5th day of October of that year, and after the filing of the bill of complaint by Haughwout against Boisaubin, and after the filing of notice of the pendency of that suit in the clerk's office of the county of Morris. It further charges that the

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said Murphy had actual knowledge of the contract of purchase made by Haughwout with Boisaubin, and of the intention of Haughwout to commence a suit for specific performance, long before the delivery of his deed and the payment of any part of the consideration money therefor; and that the defendant accepted the said conveyance, and paid the purchase money therefor, with actual knowledge of the existence of the complainants' contract, and of the pendency of the suit for the specific performance thereof.

The prayer of the bill is, that the title of the complainants to the said three lots may be ratified and established, and declared to be good and valid as against the claim of title made to the same by said Murphy, and be declared paramount thereto; and that the claim of title to the said lots by the said Murphy, under his deed of conveyance from Boisaubin, be declared invalid and of no effect against the title of the complainants, and that the defendant may be directed to release and convey to the complainants; and that the complainants may have such other and further relief, &c.

A suit in chancery, duly prosecuted in good faith, and followed by a decree, is constructive notice to every person, who acquires from a defendant, *pendente lite*, an interest in the subject matter of the litigation, of the legal and equitable rights of the complainant as charged in the bill and established by the decree.

This effect of a successful litigation in subordinating the title of a purchaser pending a litigation, to the rights of the complainant as established in the suit, is not derived from legislation. It is a doctrine of courts of equity, of ancient origin, and rests not upon the principles of the court with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit. *Bellamy v. Sabine*, 1 *DeG. & J.* 566; *Metcalfe v. Pulvertoft*, 2 *V. & B.* 205; *Walden v. Bodley's Heirs*, 9 *How. (U. S.)* 49; *Murray v. Lyburn*, 2 *Johns.*

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Ch. 441. Such a purchaser need not be made a party, and will be bound by the decree which shall be made. 1 *Story's Eq.*, § 406; *Story's Eq. Pl.*, §§ 106, 351; *Bishop of Winchester v. Payne*, 11 *Ves.* 196.

Before any statutory provision was made requiring notice of the pendency of the suit to be filed in order to charge a subsequent purchaser from the defendant with notice of the litigation, it became the established practice that subpoena served and bill filed were necessary before the suit was considered as commenced, so as to make its pendency constructive notice to persons deriving title from the parties, and to give the decree a conclusive effect against such persons. 1 *Vern.* 318; 2 *Maddock's Ch. Prac.* 325; 2 *Sug. V. & P.*; *Hill on Trustees* *511; *Hayden v. Bucklin*, 9 *Paige* 512; *Dunn's Lessee v. Games*, 1 *McLean* 321; *S. C.*, 14 *Peters* 322, 333. An assignee who takes an assignment from the defendant after bill filed, but before subpoena served, is a necessary party. *Powell v. Wright*, 7 *Beav.* 444. By the fifty-seventh section of the Chancery Practice Act, (the provisions of which are similar to the New York act of 1834, and to the English statute of 3 & 4 *Vic.*, *ch.* 11, *sec.* 7,) another requisite is superadded in order that the proceedings in the suit shall effect a bona fide purchaser or mortgagee: a written notice of the pendency of the suit must be filed in the clerk's office of the county in which the lands to be affected lie. *Nix. Dig.* 112. This section is expressed in negative terms, and has not changed the former practice except in prescribing that notice of the *lis pendens* shall be filed before a bona fide purchaser or mortgagee shall be chargeable with notice of the pendency of the suit, notwithstanding the bill has been filed and the subpoena served.

But the defendant was not a purchaser *pendente lite*. He acquired title by a deed which bears date on the 7th day of August, 1865, and was acknowledged on the next day. The defendant testifies that it was delivered on the 7th of August. Boisaubin's testimony is that it was delivered on the 7th or 8th. From the date of the acknowledgment of the mort-

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gage, it is probable that it was not finally delivered before the 19th. The proof, however, is full and clear that it was executed and delivered to Murphy before the bill was filed in the case of *Haughwout v. Boisaubin*. The commencement of a suit in chancery is constructive notice of the pendency of such suit only as against persons who have acquired some title to or interest in the property involved in the litigation, under the defendant, after the suit is commenced. *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Hopkins v. McLaren*, 4 Cow. 667; *Parks v. Jackson*, 11 Wend. 442. A person whose interest existed at the commencement of the suit is a necessary party, and will not be bound by the proceedings unless he be made a party to the suit. *Ensworth v. Lambert*, 4 Johns. Ch. 605.

The complainants' right to relief on the ground that the defendant was a purchaser from Boisaubin *pendente lite* having failed, it must be considered whether, in the other aspect of the case, he will be entitled to relief. In this aspect the bill is to be taken to have been filed for the execution of the trust arising from the prior contract between Haughwout and Boisaubin for the purchase of the lands, by the conveyance to the complainant, by Murphy, of the legal title which he acquired by his deed. In this aspect of the case, the bill is a bill for specific performance.

In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contract, the vendor is the trustee of the legal estate for the vendee. *Crawford v. Bertholf*, Saxton 460; *Hoggland v. Latourette*, 1 Green's Ch. 254; *Huffman v. Hummer*, 2 C. E. Green 264; *King v. Ruckman*, 6 C. E. Green 599. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money. 1 *Story's Eq.*, § 789; 2 *Ibid.*, § 1213. If the vendor should again sell the estate of

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which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became trustee, and therefore liable to account. 2 *Spence's Eq. Jur.* 310. Or the second purchaser, if he have notice at the time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser. *Hoagland v. Latourette*, 1 *Green's Ch.* 254; *Downing v. Risley*, 2 *McCarter* 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor and is as much a trustee as he was. 1 *Eq. Cas. Abr.* 384; *Story v. Lord Windsor*, 2 *Atk.* 631. The *cestui que trust* may follow the trust property in the hands of the purchaser, or may resort to the purchase money as a substituted fund. *Murray v. Ballou*, 1 *Johns. Ch.* 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends.

The defendant insists that he holds the lands discharged of any trust in favor of Haughwout, or the complainants, by reason of his being a bona fide purchaser for a valuable consideration without notice.

The proof is, that at the time of the delivery of the deed, \$400 of the consideration money was paid, and the balance secured by mortgage. Conceding that the \$400 was actually paid before Murphy had notice of Haughwout's claim, the defence of a bona fide purchase is not supported. Before the mortgage became due, Murphy had actual notice of the existence and nature of Haughwout's claim.

The defence of a bona fide purchase may be made by plea, in bar of discovery and relief, or by answer, in bar of relief only. If made by plea, the payment of the whole of the consideration money must be averred. An averment that part was paid and the balance secured by mortgage, will not be sufficient. *Wood v. Mann*, 1 *Sumner* 506. Proof of the

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payment of the whole purchase money is essential to the defence, whether it be made by plea or answer. *Jewett v. Palmer*, 7 *Johns. Ch.* 65; *Malony v. Kernan*, 2 *Drury & Warren* 31; *Losey v. Simpson*, 3 *Stockt.* 246. Notice before actual payment of all the purchase money, although it be secured and the conveyance executed, or before the execution of the conveyance, notwithstanding the money is paid, is equivalent to notice before the contract. 2 *Sug. V. & P.* 533 (1037); *Hill on Trustees* 165. If the defendant has paid part only, he will be protected *pro tanto* only. 1 *Story's Eq.*, § 64 c.; *Story's Eq. Pl.*, § 604 a.

What the measure of relief shall be in cases where the deed has been executed and delivered and part of the purchase money paid before notice of the previous contract to sell to another, was elaborately discussed by the counsel of the appellants. The Chancellor held, under the authority of *Flagg v. Mann*, 2 *Sumner* 487, that a contract of purchase, executed by delivery of the deed and payment of part of the purchase money without notice of the previous contract, gave the purchaser a right to hold the land, and that the equity of the person with whom the previous contract was made, was merely to have the unpaid purchase money.

The law of the English courts is, that until the defence of a bona fide purchase is perfected by the delivery of the deed of conveyance, and the payment of the entire consideration money, such purchaser is without any protection as against the estate of the equitable owner under a prior contract, even though he contracted to purchase, and accepted his deed and paid part of the purchase money in good faith; his only remedy being against his vendor to recover back what he has paid on a consideration which has failed. In some of the American courts this doctrine has been qualified to the extent of enforcing specific performance of the prior contract, on condition that the purchaser shall be indemnified for the purchase money paid, and also for permanent improvements put upon the property before notice, on the principle that he

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who asks equity must do equity. The cases are collected in 2 *Lead. Cas. in Eq.* 1; notes to *Basset v. Nosworthy*.

The doctrine of the English courts is necessary to give effect to the principle that in equity, immediately on the contract to purchase, an equitable estate arises in the vendee, the legal estate remaining in the vendor for his benefit. Qualified by the obligation to make compensation to any subsequent bona fide purchaser, who has paid part only of the consideration money, for all disbursements made before notice, the rule is every way consonant with correct principles. Such indemnity is protection *pro tanto*.

But whatever the nature of the relief may be in cases where the naked question of the acceptance of a deed and payment of part of the consideration before notice is presented, the relief indicated by the Chancellor is the only relief the complainants would be entitled to under the circumstances of this case. The rule of law which deprives a subsequent purchaser who has contracted and accepted a conveyance, and paid part of the purchase money in good faith, of the fruits of his purchase without indemnity, is exceedingly harsh, and often oppressive in its application. Mitigated by the obligation to make indemnity for payments and expenditure before actual notice, its operation is nevertheless frequently inequitable. A party who asks the enforcement of a rule of this nature against another who is innocent of actual fraud, must seek his remedy promptly. He may lose his right to specific relief against the lands by laches, and be remitted to the unpaid purchase money as the only relief which will be equitable. In cases where the prayer is for the specific performance of a contract between the immediate parties to the suit, delay in filing the bill is often of itself a bar to relief. *Merritt v. Brown*, 6 *C. E. Green* 401.

The agreement between Haughwout and Boisaubin was made on the 24th of September, 1863. In February, 1864, Haughwout gave Boisaubin notice of his election to take the property under the agreement. After this notice was given, Boisaubin laid the property out in lots and publicly offered

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them for sale. Murphy's deed for the three lots of which he became the purchaser, was executed and delivered in August, 1865. The bill in the suit of Haughwout v. Boisaubin, was filed the last day in the same month. The solicitor who appeared for Haughwout in that suit, had notice of the existence of Murphy's deed within a few days after his bill was filed. Boisaubin, in his answer, which was filed on the 3d of November, 1865, specifically sets out the fact of the conveyance to Murphy and the circumstances connected therewith. Murphy was himself examined as a witness on the 5th of April, 1866, and testified in relation to the conveyance to him. Haughwout must be charged with notice as early as April, 1866, that Murphy intended to assert his right to the land. The bill in this case was not filed until the 4th of April, 1868. After this long delay it would be inequitable to enforce specific performance against the defendant. The fact that there were delays in the prosecution of that suit to final decree, which were unavoidable, ought not to prejudice Murphy. He should have been made a party to that suit.

Besides that, the bond and mortgage which were given by Murphy to Boisaubin for the unpaid purchase money, were assigned by Boisaubin to one Geoffrey, on the 16th of April, 1866, and by Geoffrey further assigned to William Davidson, on the 2d of July of the same year, and notice of such assignment given to Murphy by the solicitor of Davidson. The money due on the mortgage was paid at its maturity by Murphy to Davidson's solicitor. That Davidson, in the transaction, was acting for Haughwout, and that the money wherewith this assignment was procured was paid by Haughwout, and that the proceeds when collected were realized by him, are indisputable.

That the assignment was made by Geoffrey to Davidson, as collateral security, will not affect the case. When Murphy received notice of the prior equitable title of Haughwout, he was entitled to have the security he had given for the unpaid purchase money surrendered. *Tourville v. Naish*,

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3 *P. Wms.* 307. The subsequent assignments were taken and the money received, with full notice of all the circumstances. The money received on the mortgage Haughwout still retains. It is no answer to say that in decreeing specific performance Murphy may have the money refunded to him. Haughwout might have insisted upon having the land itself, or at his option, pursued the proceeds of the sale. He cannot have both. By accepting a security given for the purchase money, he is deemed to have affirmed the sale so far as respects the purchaser. *Murray v. Lylburn*, 2 *Johns. Ch.* 441; 2 *Story's Eq.*, § 1262; *Scott v. Gamble*, 1 *Stockt.* 218.

The complainants are not entitled to relief. The decree of the Chancellor is affirmed, with costs.

The whole court concurred.

KING, appellant, and RUCKMAN, respondent.

1. After a cause has been heard upon the merits, the judgment properly entered, and the papers remitted to the court below, the Court of Errors has no further jurisdiction with respect to the case.

2. A judgment entered by mistake may be amended, or if procured by fraud, may at any time be set aside.

3. This court may order a re-argument while a cause is still pending, and before the papers have been remitted.

Quare. Whether motion for a re-argument will in any case be entertained unless it proceed from some member of the court who concurred in the judgment.

This cause was argued and decided on the merits at the last term. The decree of the Chancellor was reversed. The judgment of this court was duly entered on the minutes, with the usual order to remit, &c. This judgment, together with the pleadings, exhibits, and other papers, were sent to and duly filed in the Court of Chancery.

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At this term of this court a motion to re-hear the case was made, founded on a petition which counsel offered to read.

Mr. Woodruff and *Mr. Dixon*, for motion.

Mr. W. L. Dayton and *Mr. C. Parker*, contra.

The opinion of the court was delivered by
THE CHIEF JUSTICE.

The question is whether the present motion ought to be heard. The case has been entertained by this court upon its merits, judgment entered, and the papers and proceedings remitted. It is not pretended that the judgment has been taken through deception or mistake, but it is insisted that this court can, at this stage of the proceedings, vacate its own judgment, recall the record from the inferior court, and review the case on the merits. I can find no authority for such a course of practice. It is opposed to the policy of the law as well as to the settled practice of appellate courts. I cannot find that such an irregularity is apparent anywhere on the minutes of this court. It is clear that it is a departure from the admitted procedure in the House of Lords. It is true, as appears from *Lord Hale's Jur. H. L. 124*, that in that tribunal, in the time of Richard II, a right of reviewing its own decisions, by a process which was called a writ of petition of error, did exist; and that, until about the close of the seventeenth century, upon appeals from chancery, re-hearings were granted. But since that time it does not appear that a re-hearing upon the merits has ever been permitted before that court. In *Sidney on Appeals*, p. 32, it is said: "When the minutes of an order have been read at the table of the House of Lords, it is considered as final and unalterable, even upon appeals from chancery." In some cases, however, mere formal defects have been removed, and clauses added, so as to carry out the views of the court. Such course was taken in *McGavin v. Stewart*, 4 *Wilson &*

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Shaw 184, in which the judgment had directed the parties to be sworn in the court below; and afterwards, it being shown to the court that some of the parties were dead, the House, at a subsequent term, ordered the direction as to the examination of the parties as witnesses to be struck out of its judgment. A similar principle was acted on in *Tommey v. White*, 4 *H. L. Cas.* 333, the court at a subsequent term revoking its final decree on the ground that such decree had been procured by deception. In the practice of this court, therefore, it seems clear that an error in a decree or judgment, occurring from fraud or mistake, will be rectified; and it is also equally clear that a final judgment will not be re-heard upon the merits. Upon this point the language of the judges in the case just cited of *Tommey v. White* is very explicit. The Lord Chancellor said: "Several authorities were referred to in which it had been stated by Lord Eldon and other learned judges, that a case once decided here between A and B is, as against A and B, conclusively and forever decided, and that nothing but an act of Parliament can afterwards alter the decision. I think that is so." And in this same case, when it was first before the court (3 *H. L. Cas.* 69), Lords Truro and Brougham used language of similar import. The same rule of practice, subject to the qualifications above expressed, has been repeatedly sanctioned and enforced in the courts of New York and in the courts of the United States. *The People v. The Mayor, &c.*, 25 *Wend.* 252; *Legg v. Overbagh*, 4 *Wend.* 188; *Dela-plaine v. Bergen*, 7 *Hill* 591; *Hosack v. Rogers*, 7 *Paige* 108.

In *Martin v. Hunter's Lessee*, 1 *Wheat.* 355, the language of Judge Story is as follows, viz. "A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments." See also *Southard v. Russell*, 16 *How.* 571; *The Palmyra*, 12 *Wheat.* 11.

These cases show plainly what the usual rule of practice is in courts proceeding by force of an appellate jurisdiction; and I think, also, it is the usual course in this court. After

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final judgment pronounced and entered, and a sending down of the record, there is no known instance of this court's again taking cognizance over the case. I have no doubt that this court has the power at any time to amend its judgment, if it is erroneous by reason of the mis-entry of the clerk, or by reason of any other mistake; or that such judgment may be set aside and treated as a nullity, if it has been procured by fraud, or is the result of misapprehension. But I also think that when such judgment has been rendered after a hearing upon the merits, and has been entered on the minutes in accordance with the views of the court, and the record has been regularly remitted to the inferior court, this court has no further jurisdiction in the case.

It should be understood that the foregoing remarks have no application to the power of this court to order, at its pleasure, a re-argument of any case which may be pending before it. This prerogative exists, it is presumed, until the record is actually remitted to the court below. Two instances, which occurred within the last few years, are remembered in which this authority was exercised. It is obviously a power which should be very sparingly used, and perhaps in no case unless upon the motion of the court. This court has never, so far as I am aware, decided that it is competent for counsel to move for a re-argument. The point was not raised or decided in either of the cases just referred to. In the Supreme Court of the United States, it is the settled practice that a re-argument will not be heard unless some member of the court who concurred in the judgment desires it, and it will be then ordered without waiting for the application of counsel. *Brown v. Aspden's Adm'rs*, 14 How. 25. Whether the same rule should not be adopted by this court will be a proper subject for consideration when the point shall arise.

In the present case, the motion to re-hear the case upon the merits must be refused on the grounds already stated.

The whole court concurred.

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VANDERVEER'S ADMINISTRATOR, appellant, and HOLCOMB
and wife, respondents.

1. Where a defendant answers by favor of the court, he must be restricted to an equitable answer; where he has a right to answer, such limitation cannot be imposed.

2. Where husband and wife are properly made defendants to a bill, the complainant is entitled to a joint answer, and a separate answer may be suppressed.

3. When the complainant is entitled to an equitable answer, he may appeal if the defendant is permitted to set up usury without offering to pay the sum actually due.

The complainant filed his bill for the foreclosure of a mortgage against Holcomb and wife, who were non-residents. The usual order was taken requiring the defendants to plead, answer, or demur on or before August 26th, 1869.

August 26th, 1869, Holcomb alone filed a demurrer, which was overruled by an order made May 31st, 1870, directing the defendants to answer in forty days, and that on failure to answer, the bill be taken as confessed. The time to answer under this order expired July 10th, 1870.

On the 23d of June, 1870, Holcomb, without appearing for his wife, or in any way answering for her, filed his separate answer.

October 3d, 1870, the Chancellor made an order suppressing Holcomb's answer as irregular, and directing it to be stricken from the files, and giving him leave to answer in thirty days, setting up only an equitable defence.

October 28th, 1870, on application of the defendants' counsel, the Chancellor made a further order modifying the order of October 3d, 1870, by striking out of that order the following clause: "And it is further ordered that the said defendants, Charles P. Holcomb and Sarah Holcomb, his wife, have leave to file an answer to complainant's bill, which shall set up an equitable defence only, within thirty days

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from the date of this order ;" and directing that said defendants have leave to file an answer within thirty days from the 28th day of October.

The complainant has appealed from this last order.

Mr. Ransom, for appellant.

Mr. J. R. Emery, for respondents.

The opinion of the court was delivered by

VAN SYCKEL, J.

When a defendant fails to answer the complainant's bill within the prescribed time, and is compelled to appeal to the favor of the court for leave to file his answer, he will be restricted to an equitable defence, and will not be permitted to set up usury ; but where he has a right to answer, no such limitation can be imposed. *Collard v. Smith*, 2 *Beasley* 43; *Remer v. Shaw*, 4 *Halst. Ch.* 355; *Campion v. Kille*, 2 *McCarter* 476.

In *Marsh v. Lasher*, 2 *Beas.* 253, in which application was made to open a decree, Chancellor Green says : " The only defence disclosed by the evidence is an allegation that the mortgage is founded on a usurious contract. The decided objection to this ground of relief is that usury is not regarded as an equitable defence, and that where a defendant is asking as a matter of favor to be permitted to defend on the ground of usury, neither a court of law or of equity will grant the favor. It is too late to discuss the reason or policy of the rule. It is as well settled as any rule of practice can be, and there is no good reason to disturb it."

The same rule was adopted in New York in the case of *The Fulton Bank v. Beach*, 1 *Paige* 432; *S. C.*, on appeal, 3 *Wend.* 573. In this case the defendants asked leave to amend, with the avowed object of getting rid of the payment of moneys actually loaned, as well as of the usurious excess. Chancellor Walworth held " that the granting of

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such an application would not be the exercise of a sound legal discretion, as it would be a violation of the settled principles of the court."

In *Allen v. Mapes*, reported in 20 *Wend.* 633, this rule was adopted in a very limited form. In that case the defendant, upon satisfactorily excusing his delay, was permitted to open an inquest taken at the circuit, and interpose the defence of usury. Justice Bronson, in his opinion, says: "If we impose a condition requiring the defence of usury to be abandoned, we must in effect say that any accident by which the plaintiff obtains a regular default, will always exclude this defence. I cannot go so far. Whatever we may think of the policy of the statute against usury, it is our duty to enforce it so long as it remains on our statute book. The nature of the defence should never be taken into consideration in granting applications of this kind, except in very special circumstances."

Without discussing the question whether the rule that he who seeks a favor from the court must offer to do equity, will be as inflexibly applied at law as in equity, or whether for a refusal to apply the rule any remedy exists at law, it is manifest that the views of Justice Bronson are not consistent with the principle upon which the unconscionable defence is excluded, and they have not been regarded as authority for subsequent cases. *National Ins. Co. v. Sackett*, 11 *Paige* 660; *Watt v. Watt*, 2 *Barb. Ch.* 371; *Quincy v. Foot*, 1 *Ibid.* 496.

The plea of usury, when interposed in season, is not available because it is equitable, but because it is the strict legal right of the defendant to set it up, and he cannot be hindered. The inequity is inherent in the nature of the defence itself, and does not depend upon the time at which it is raised.

It is none the less unconscionable to refuse payment of the money actually received when the borrower appeals to the statutory bar in strict time, than when he can do so only by indulgence of the court. If, by circumstances beyond his

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control, he fails to file his answer in time, he simply loses the opportunity to do an inequitable act. No circumstances can make it equitable for the borrower who has received one thousand dollars upon an usurious agreement, to keep the lender's money without paying him a farthing for it. When he asks the aid of the statute as a right, his defence prevails because it is his right and not because it is equitable.

The rule that he who sets up usury by the favor of the court must offer to pay the sum actually due, has been rigidly adhered to in this state, and no case is known in our equity practice where its application has been controlled by the circumstances attending the defendant's default, or where the rule has been relaxed because such default could be satisfactorily excused. The rule was carried to the same extent in New York, in *Wager v. Stickle*, 3 *Paige* 406, where the defendant's default was satisfactorily explained. It is a settled rule, which the complainant in this case has a right to appeal to if the defendants cannot file their answer without the favor of the court. It is not a matter which lies within the arbitrary discretion of the court, but is governed by a well defined and clearly settled principle.

Where husband and wife are properly made defendants to a bill, the husband cannot answer alone; the complainant is entitled not only to a joint answer, but also to the oath of each; and the answer of the husband alone is irregular, and will be suppressed. *Collard v. Smith*, 2 *Beasley* 43; *Robbins v. Abrahams*, 1 *Halst. Ch.* 16; *Perrine v. Swaine*, 1 *Johns. Ch.* 24; *Gee v. Cottle*, 3 *M. & Cr.* 180.

The separate answer of the husband having been suppressed, he was in the position of a defendant who had filed no answer at all, and the complainant was strictly entitled to his decree *pro confesso*.

The case wholly differs from that of an insufficient answer. An insufficient answer cannot be suppressed and a decree *pro confesso* entered. If the defendant's answer is adjudged insufficient, he shall file a second answer in thirty days. *Nix. Dig.* 110, *pl.* 31. This is the defendant's right; and,

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therefore, in such second answer terms cannot be imposed upon him.

The order suppressing the answer of Holcomb was regularly entered, and put the defendants in default; they had no strict right after that to their answer.

If the court below shall refuse to hold them to an equitable answer, such refusal could not be classed among non-appealable matters, lying wholly in discretion. The mere fact that a matter lies in discretion does not necessarily exclude an appeal. Where, as in this case, the discretion of the Chancellor is controlled and governed by a fixed and determined rule, the failure to apply which would substantially affect the legal and equitable rights of the complainant, an appeal would lie. 6 *C. E. Green* 485; *Rowley v. Van Benthuyzen*, 16 *Wend.* 378.

The conclusion that the defendants must be restricted to an equitable defence, and that they cannot insist upon the plea of usury without offering to pay the sum actually due, with legal interest, does not dispose of this case. The order brought up for review is not appealable unless the complainant is aggrieved by it.

As the order now stands, the defendants had leave given them to file their answer in thirty days. The Chancellor's reasons for striking out the clause in the order of October the 3d, are not certified to this court, and we cannot say that the Chancellor thereby intended to allow the defence of usury to be introduced if the defendants did not offer to pay the sum actually due. This court will presume that, under this general order, the defendants will be held to a strictly equitable defence.

The complainant is not aggrieved by the order appealed from; he will not be aggrieved in the premises until the defendants set up an unconscionable defence, and the Chancellor shall refuse to strike it out.

The complainant's mortgage was executed prior to April, 1864. Whether the rule which governs this case will be applicable to usurious contracts made since the act of April

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12th, 1864, took effect, must be determined when the question arises.

In my opinion, the appeal should be dismissed with costs, for the reason that it does not appear that the defendants under the order as it stands will be permitted to set up an inequitable defence, and therefore the complainant is not aggrieved by it.

The whole court concurred.

BENT and others, appellants, and SMITH and others, respondents.

1. On proof that a declaration of trust of real estate had been signed according to the statute of frauds, but was lost, the trust will be established.

2. The answer denied the fact of the trust and the written declaration as alleged in the bill. *Held*, that two witnesses are not necessary to overcome the positive and direct response of the defendant under oath in his answer, but that it may be overcome and a decree made, either upon the strength of two witnesses, or one alone with corroborative circumstances giving a turn to the balance, or a preponderance of proof in favor of the complainant, and thereby producing conviction to the mind.

3. Relief will not be denied by reason of laches in filing the bill to establish the trust, if the delay is satisfactorily explained.

The opinion of the Chancellor is reported in 5 *C. E. Green* 199.

Mr. Gilchrist, Attorney-General (with whom was *Mr. Browning*), for appellants.

I. The existence of the declaration of trust is sufficiently proved, though only one witness testifies to being present at its execution.

The rule that the direct responsive answer of a defendant as to a fact within his own knowledge, must prevail unless overcome by more evidence than the oath of one witness, was misapplied by the court below. Its application is always

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difficult. 1 *Hoff. Ch.* 188. The rule has many exceptions. *Robinson v. Hardin*, 26 *Georgia* 344.

"More evidence" in the sense of the rule does not mean another witness; one witness with corroborating circumstances is enough to overcome the answer.

"The reason of the rule is that there being a single deposition only against the oath of the defendant in his answer, the denial of facts by the answer is equally strong with the affirmation of them by the deposition. Where, therefore, there are *any* corroborating circumstances in favor of the plaintiff's case, which give a preponderance in his favor, the court depart from the rule." 2 *Daniell's Ch. Pr.* (3d *Am. ed.*) 843, and many cases there cited; 1 *Greenl. on Ev.*, § 260; *Gresley's Eq. Ev. introduction*, p. 4, note f, and p. 156; 1 *Phil. Ev.* (Cowen & Hill's ed.) 154, 155, and notes; *Sturtevant v. Waterbury*, 1 *Edw. Ch.* 444; 9 *Cranch* 160; 5 *Peters* 111.

The answer that *denies* may contain the circumstances to corroborate the plaintiff's proof, so as to overcome itself when taken in connection with the proof. *Pierson v. Catlin*, 3 *Vt.* 272; *Maury v. Lewis*, 10 *Yerger* 115; 2 *Daniell's Ch. Pr.* 843.

It has been laid down in numerous cases, that circumstances alone in the absence of a positive witness, may be sufficient to overcome the denial even of a person who answers on his own knowledge. *Long v. White*, 5 *J. J. Marsh.* 238; 1 *Hoff. Ch.* 189, 190; 9 *Cranch* 153, 156, 160; *Robinson v. Hardin*, 26 *Georgia* 344; *Gould v. Williamson*, 21 *Maine* 276.

Slight circumstances are enough to support a single witness against a denial in the answer. *Gresley's Eq. Ev.*, p. 4, note f, and cases cited, and p. 156; *Sturtevant v. Waterbury*, 1 *Edw. Ch.* 443, 444.

In the case in hand, the answer itself affords a corroboration of the witness. Though the defendant denies the execution of the declaration of trust, yet he admits that one of Bent's *objects* in making the assignment of the agreement to

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the defendant, was that Mrs. Bent might have a place to live in. Though he denies the charge of spoliation by himself, he does not deny it by his wife.

The answer abounds in negative pregnant, and is evasive.

The possession of the lease and agreement, and of assignment by the deceased, is admitted certainly for six months, and proved by Mrs. Bent afterwards in November, 1854, up to April, 1851. Payment of rent by Mrs. Bent to Westervelt, and admission of the trust to Mrs. Bent by the defendant, and many other circumstances.

II. There are no such laches in this case as will deprive the *cestui que trust* of the right to set up the trust.

The delay is accounted for by the poverty of the children; the nonage and absence of Richard; the influence of Smith with the family; the supposed loss of all evidence to establish the trust, and the discovery of the evidence shortly before bringing the suit.

The cases on the subject do not justify the disposition of this case against the complainants on the ground of laches, nor does the Chancellor allude to it. It is, however, suggested in the answer, but laches must always be accompanied with some change of position by the defendant.

He must be injured by enforcing the trust after laches. See *Knight v. Bowyer*, 2 DeG. & J. 421, 443; *Sturgis v. Morse*, 3 DeG. & J. 1; *Obert v. Obert*, 1 Beas. 429; *Marsh's Ex'rs v. Oliver's Ex'rs*, 1 McCarter 262.

Mr. I. W. Scudder, for respondents.

1. The main ground of equity in the complainants' bill, as a question of fact, has not been sustained by the proofs, but the proofs are conclusively to the contrary.

The equity of the complainants' bill is, that when John Calvin Smith took the deed of assignment of the agreement and lease, made between Westervelt and Bent, he took the same in trust. The charge in the bill is, that this declaration of trust was in Smith's possession, or in his wife's possession, or destroyed.

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The answer is full and unequivocal that no such declaration of trust was ever made.

The oath of a single witness will not prevail against a distinct and positive assertion in the answer. *Gresley's Eq. Ev.* 156.

The agreement and lease, and assignment, show clearly that no declaration of trust was ever executed.

2. The pretence set up by the complainant that Smith, or his wife, or some one in his behalf, between the time of the death of Bent and the time of the funeral, went to Bent's rooms, in Jersey street, New York, and took away all Bent's books of account, and also the declaration of trust, is wholly disproved.

3. The fact that this pretended declaration of trust was never seen by any member of Mr. Bent's family, is strongly against its existence.

4. All the surrounding circumstances show an abandonment of all equitable claim on the property, if any existed.

5. The declaration of trust, as set out in the bill, is expressly confined to an assignment of the lease, and does not relate to the right to purchase the fee simple of the land.

The declaration of trust must be in writing, under the statute to prevent frauds and perjuries. *Nix. Dig.*, p. 358, sec. 11; *Hill on Trustees*, marg. p. 57; *Drake v. Newton*, 3 Zab. 111; *Baldwin v. Campbell*, 4 Halst. Ch. 891.

The trust cannot be enlarged beyond the terms set forth in the written declaration; if it could, it would result in doing away with the statute of frauds.

6. Loose conversations or general declarations cannot create a trust or constitute evidence of a trust. *Steere v. Steere*, 5 Johns. Ch. 1; *Nix. Dig.* 358, sec. 11.

7. If the assignment was made to hinder, delay, or defraud creditors, it was good as against Bent and his heirs.

Lokerson v. Stillwell, 2 Beas. 357; *Den v. Monjoy*, 2 Halst. 174; *Jackson v. Garnsey*, 16 Johns. 192; *Roberts on Fraud. Con.* 646; *Jackson v. Dutton*, 3 Harrington 98.

8. Lapse of time is a bar in a case like this.

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Thirteen years, four months, and fourteen days elapsed between the date of the assignment and the exhibition of the bill. The pretended declaration of trust was not under seal. The statute of limitations had run against the agreement to deliver up or assign the assignment, if any such agreement existed. *Hill on Trustees, marg. p. 168; Pickering v. Lord Stamford, 2 Ves., jun., 583.*

The trust was properly denied by the answer. *Story's Eq. Pl., § 762.*

The opinion of the court was delivered by

BEDLE, J.

The bill seeks to establish a trust against the defendant, Smith, in favor of the complainants, who are the heirs-at-law of Richard Bent, deceased, in a certain house and lot at Tillietudlum, Bergen county; also, to compel a conveyance of the property and an account of the profits.

On the 23d day of February, A. D. 1848, Peter Westervelt, jun., agreed in writing with Richard Bent to sell to him the house and lot in question for \$4000, the deed therefor to be delivered at any time within seven years, upon payment of \$1000 in cash, and securing the balance, to be paid in annual instalments, by bond and mortgage, with interest at six per cent., payable semi-annually; and that, in the meantime, Bent should pay \$116.50 every six months, in advance, as rent, for the term of seven years, or until the deed should be delivered. This agreement was assigned by Bent to Smith, together with Bent's estate in the premises, by a writing, under his hand and seal, dated August 18th, 1849; and Bent, by a tenant's agreement of the same date, agreed to hire the property of Smith for one year from August 20th, 1849, at the yearly rent of \$240, payable half-yearly. The agreement of Westervelt, the assignment, and tenant's agreement, are exhibits in the cause, produced by Smith; and Smith says that, contemporaneous with the tenant's agreement, he gave to Bent a landlord's agreement. This, however, is not an exhibit, as the same cannot be found.

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Bent entered into possession under the Westervelt contract, and continued to possess the property, before and after the assignment to Smith, up to the time he (Bent) died, January 30th, 1851; after which Smith, some time in the spring of 1851, took the possession, and on the 1st day of April, 1852, received from Westervelt a conveyance on the terms mentioned in the agreement. Since then Smith has possessed the premises.

The bill was filed December 20th, 1862. At the date of the assignment, Bent was about seventy-eight years of age, and his wife about fifty-eight. Their children are the three complainants, one of whom, the son, when the assignment was made was a minor, and the other two, the daughters, were then married. Bent's wife was a widow previous to her marriage with Bent, having two children, one of whom is the wife of Smith. The property was occupied by Bent and his wife, during the summer season, for boarders; and a good deal of the time, in the winter, the wife would stay with her daughters, Mrs. Smith and Mrs. Reid, in the city of New York. The bill sets out that Richard Bent, being of great age, desired to provide in case of his death for the care and charge of this property, and for the carrying out of the purchase for the benefit of his wife and children; and having confidence in Smith, he made the assignment to him in trust for himself (Bent), and in case of his death in trust for his widow and children, to wit, Jane Bent, the widow, and the complainants, Richard M. Bent, Jane Reid, and Ellen Brown; and that, to manifest the said trust, Smith, on the 18th day of August, 1849 (the same date of the assignment), made and signed a declaration of trust to the effect stated. The bill distinctly alleges that the assignment was in fact made in trust, and that it was manifested in writing, signed by Smith. The answer denies the fact of the trust and the written declaration. The case is clearly within the statute of frauds, unless the evidence shows a declaration in writing signed by Smith. This is the material question in the cause, and is one of fact. The evidence is undoubtedly

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to be regarded as close, yet the conclusion is entirely satisfactory that such written declaration of trust was signed by Smith contemporaneous with the making of the assignment. The rule as to the amount of proof necessary to overcome the positive and direct response of an answer and warrant a decree, is this: If the case rests merely on the testimony of a single witness, against the express answer of the defendant to the allegations of the bill, where the answer is "positively, clearly and precisely" responsive, no decree will be made but to dismiss the bill; or, as expressed by Chancellor Green in *Brown v. Bulkley*, 1 *McCarter* 299, "Where there is merely oath against oath, that of the defendant in his answer must prevail."

But the answer may be overcome by either two witnesses, or one alone with corroborative circumstances giving a turn to the balance, or a preponderance of proof in favor of the complainant. *Gresley's Eq. Ev.* 4, and cases in note; 1 *Greenl. Ev.*, § 260; 2 *Story's Eq.*, § 1528; 2 *Daniell's Ch. Pr.* 985, 983, *n.* 1; *Clark's Ex'rs v. Van Riemsdyk*, 9 *Cranch* 160; *Cooth v. Jackson*, 6 *Ves.* 12; *Evans v. Bicknell*, *Ibid.* 183; *East India Co. v. Donald*, 9 *Ves.* 281.

The same rule was substantially laid down by Chancellor Pennington in *Chance v. Teeple*, 3 *Green's Ch.* 174, in this language: "The Master has probably felt himself bound by the principle that two witnesses are necessary to overcome the answer of the defendant. This is not universally true; one witness and corroborating circumstances are sufficient."

The early rule of the English Court of Chancery was that two witnesses were necessary as the foundation of a decree against the answer; but that rule has been modified, and may now be considered established as already stated. The reason of the change is found in the text books. The expression sometimes seen that one witness and circumstances equivalent to another are necessary, is not sufficiently accurate. It is too indefinite to be used as a general test. There must be, as stated by the Chancellor in the case before us, "more evidence than the oath of one witness;" but the

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amount is not measured. That must depend upon the facts and circumstances of each case. It is sufficient if the evidence is enough to preponderate or turn the balance against the oath of the defendant, regarding it as the oath of any other witness, and not merely that of an interested defendant; and in searching for the truth involved, just so much or so little additional to the counter-balancing oath is required as will produce conviction to the mind. Subject to this explanation, the rule is also substantially laid down in *Brown v. Bulkley, supra*. The weight of the answer may also be judged of by its intrinsic worth, like the testimony of any witness, although it may be that by reason of the relation of the defendant to the complainant, he having been called upon to answer, his answer cannot be impeached by general evidence of character.

In applying the rule, it is not necessary that the corroboration should be by additional *express* proof on the particular fact in question. If that were required, it would be equivalent to another witness. The preponderance may be effected by a contradiction of other material parts of the answer, or by facts stated in the answer, or by any other evidence legally bearing on the subject matter of the cause, tending to give probability to the statement of the one witness rather than to that of the defendant, and thereby producing conviction of its truth.

The position of the defendant in his answer is briefly this: that at the time of the assignment, one and a half years after the contract, Bent could not pay the rent, and wanted to abandon the property; that it was not worth, then, \$4000, but about \$3500; that he took the assignment absolute and unqualified for the consideration of \$5, then paid by him to Bent; that he had no knowledge and did not believe that Bent desired to provide, in case of his death, for the care of the premises and for carrying out the purchase for the benefit of his wife and children; that the assignment was not taken in trust in point of fact, and that there was no written declaration of it. The complainants, on the question of the

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written declaration, produced what purported to be a copy, as follows :

“I, John Calvin Smith, hereby stipulate and agree to deliver up or re-assign to Richard Bent, or to his heirs or assigns, the assignment this day made to me by Richard Bent, in trust for the benefit of his family, whenever the same shall be demanded of me by the said Richard Bent, or heirs or assigns, or any one for him.

“This agreement, it is understood, relates to the assignment of the lease of property in Tillietudlum, New Jersey, from Peter Westervelt, jun., to Richard Bent. Dated this 18th day of August, 1849.

(Signed)

“JOHN CALVIN SMITH.”

“Witness: C. S. BRONSON.”

They also produced a witness, Bronson, a lawyer from New York, who swore that this paper was found by him in some old pigeon holes in his office, that he had not overhauled for years, among some papers of Bent; that it was a copy of an original in his own handwriting, which original was drawn in his office and there signed by Smith, and was witnessed by him, (Bronson). Bronson gave a distinct and circumstantial account of how the original came to be drawn and signed. The copy was written on a paper which was, evidently, the original draft of the Westervelt agreement, with alterations and interlineations in it. These were in Bronson's handwriting, but the draft was not. That, the witness said was handed to him, he thinks by Bent, and he (Bronson) corrected it. The copy of the declaration was in Bronson's handwriting. The loss of or inability to find the original, if it existed, was sufficiently proved to admit the secondary evidence. This witness then distinctly contradicts the answer, but if the case rested merely there no decree could be made in favor of the bill; hence the importance of corroborative circumstances. Bronson, although it was attempted to shake his testimony by Southard, another lawyer from New York who occupied an office adjoining Bronson, in the same building, and who drew the assign-

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ment, is not contradicted in anything material. Upon a careful comparison of the evidence of each, I am satisfied that it is not irreconcilable, and that Bronson is not weakened by Southard. The production of the draft of the Westervelt agreement interlined by Bronson, and the circumstantial nature of his testimony, tend very much to strengthen it; and if it is true, the contention of the bill is established. We then must look to the rest of the case—its facts and circumstances—to see on which side the preponderance of the evidence is under the rules as given, and in doing so the substance of the whole answer must not be lost sight of, as well as the mere denial of the writing declaring any trust.

Without going into detail, the case, apart from Bronson's evidence, satisfactorily shows that soon after the contract with Westervelt was made, Bent built an addition to the house of four rooms, and made improvements at an expense of from \$700 to \$1000, and that the fair value of the property was then about \$5000; and it is hardly probable that with a contract of seven years to run before he was obliged to take a deed, that Bent would give the contract and the benefit of his improvements to Smith, for the mere sum of \$5, to the deprivation of his own children. The answer of Smith, that the lease and privilege of purchase on August 18th, 1849, were of no value, and that the property was worth only about \$3000, is disproved by the facts. The case, apart from Bronson, also satisfactorily shows that there was, in fact, an agreement between Bent and Smith, that Smith should take the assignment for the benefit of Bent's family, and hold it for their benefit. This conclusion is based on the admission of Smith, sworn to in the cause, and also on a variety of circumstances leading to the same result. And in this respect the answer is also disproved, for it denies the fact of any trust apart from the writing. The rent which Bent agreed to pay by the tenant's agreement, after the assignment, was \$240, half-yearly; that was just six per cent. interest on \$4000, the contract price. Mrs. Bent testified that she paid the rent to Westervelt up to April 1st, 1851, as Bent died

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January 30th, 1851, and that the amount was \$116 and some cents. That is the amount of the half-yearly rent in the Westervelt agreement. Smith says, in his answer, that he paid the rent to Westervelt. This Mrs. Bent denies. Whatever the fact may be about that, I am satisfied that Bent fully paid the rent, either to Westervelt or Smith, and that there was no occasion to assign the contract, one and a half years after its date, by reason of Bent's inability to pay the rent. With the answer disproved in the essentials stated; and one witness positively swearing to a declaration of trust in writing signed by Smith, in opposition to the denial in the answer, and that witness' evidence incidentally corroborated by the papers produced by him; and it being very probable that such declaration was made, from what is shown to be the nature of the transaction between Bent and Smith; the conclusion follows, to my mind, that there was a declaration signed by Smith, like the copy produced. The tenant's agreement to pay rent is not inconsistent with the trust, as the effect of that was to insure the interest of the \$4000 to Smith by way of rent, he by the assignment being obliged to pay the rent; and the effect of the landlord's agreement was to secure the legal possession to Bent.

The trust then being legally proved, the next question is, whether the complainants will be denied relief on the ground of laches. The deed was procured by Smith, April 1st, 1852, and the bill was filed December 20th, 1862, nearly eleven years afterwards. Immediately after the death of Bent, his widow had disputes with Smith about the property, he claiming an absolute right to it, and she insisting to the contrary. The son, Richard was young, being only in his twenty-first year when his father died; and both of the daughters were then married. The disputes between the widow and Smith continued up to the time the deed was obtained; and having learned that he had obtained it, she then thought the case was hopeless. The papers of the deceased could not be found; they, in some way, having disappeared immediately after his death, but without the fault of the

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widow or the complainants. Not having any written evidence of the trust, the complainants had every reason to think that they had no chance for relief; and they did not discover the copy and obtain knowledge of the making and signing of the original declaration, until a short time before the filing of the bill. The delay is satisfactorily explained, and cannot prejudice the complainants.

It was suggested by defendants' counsel that the trust could only apply to that particular part of the agreement in relation to the leasing. The clause in the declaration of trust, "This agreement, it is understood, relates to the assignment of the lease of the property at Tillietudlum, New Jersey, from Peter Westervelt, jun., to Richard Bent," was not intended to limit the operation of the preceding clause, but only to designate the instrument to which it applied, and in calling it a lease, that word must be taken to refer to the whole paper, and not to a part.

The paper sufficiently shows and defines a trust in favor of Richard Bent, his heirs and assigns, in the whole assignment, to meet the requirements of the statute of frauds, and equity will trace it to the deed obtained by Smith under the contract.

In this trust estate, the widow was entitled to an estate in dower. She did not join in the bill for the reason, I suppose, that Smith had paid her seven hundred dollars, either to satisfy her for any interest she might have, or to quiet her importunity.

The decree of the Chancellor must be reversed, and a decree be made in favor of the complainants, declaring that Smith holds the premises in question, and the deed therefor, in trust for the use and benefit of the complainants, in equal undivided parts, their heirs and assigns, and establishing such trust accordingly, subject to any estate in dower of Bent's widow if still living. Also, that Smith convey the premises in fee simple to the complainants, their heirs and assigns, subject to any such estate in dower if said widow is living; and that said conveyance be made, on compliance by

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the complainants with such terms, and upon such an accounting and adjustment of the equities between the parties, as the principles of equity may require, under the direction and decree of the Court of Chancery; and reserving all further equity for the determination of that court.

The complainants are entitled to recover their costs in both courts.

Decree reversed by the following vote :

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DEPUE, KENNEDY, LATHROP, OLDEN, SCUDDER, VAN SYCKEL, WALES, WOODHULL. 11.

For affirmance—(OGDEN.

SMITH, appellant, and ALTON and others, respondents.

Decree opened, sheriff's sale set aside, and mortgagor let in to make defense, on the ground of surprise and sacrifice.

Mr. Stone, for appellant.

THE CHIEF JUSTICE.

This was an appeal from the order of the Chancellor opening the decree to sell in a foreclosure case, setting aside the sheriff's sale and letting the mortgagor in to make defence. We think this order was proper and equitable. The decree and sale were a surprise to the defendant, and the property has been greatly sacrificed.

Let the order appealed from be affirmed, with costs.

The whole court concurred.

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WILLIAMS, appellant, and WINANS and others, respondents.

1. M. M. W. brought an action at law against J. T. W. The parties submitted the matters in difference in that suit to arbitration. Their agreement of submission contained the following stipulations : " In case the said arbitrators award that the said J. T. W. pay any amount to the said M. M. W., the said J. T. W. agrees to make and execute his bond to the said M. M. W. in the penal sum of double the amount so awarded to be paid to the said M. M. W. by the said J. T. W., conditioned to pay the amount of such award in instalments of one-fifth of the said amount each, as follows : one-fifth thereof in cash, and the balance in yearly instalments of one-fifth each, with interest on the same at seven per cent. per annum, payable half-yearly ; and if any instalment shall remain unpaid for the space of ten days after the same may become due, then the whole amount remaining unpaid to become due and payable at the option of the said M. M. W. And the said parties do agree, that in case the said J. T. W. shall not, within thirty days after the said award shall be made, pay one-fifth of the said amount so awarded, and execute and deliver the bond in manner and form as above mentioned, and execute and deliver to the said M. M. W. a mortgage on the one hundred acres of land opposite his house to secure the payment of the same, or pay the amount of the said award, less \$500, then this submission may be made a rule of the Supreme Court of the state of New Jersey, upon the application of either party." The arbitrators awarded that J. T. W. should pay M. M. W. the sum of \$5853.70. *Held*, that by this agreement J. T. W. was bound either to pay down the whole amount awarded, less \$500, or to pay one-fifth of the amount awarded in cash, and secure the balance by bond and mortgage, in thirty days after the date of the award.

2. M. M. W. filed a bill against J. T. W. and certain alleged fraudulent encumbrancers and grantees, praying that J. T. W. might be specifically decreed to perform his agreement, and that the alleged fraudulent mortgages and conveyances might be declared fraudulent and void as against the plaintiff. After answer and replication, a supplemental bill, or bill in the nature of a supplemental bill, was filed against the original defendants and one D. C., in which it was charged that the original defendants, or some of them, procured a sheriff's sale of the said property on certain paid judgments against J. T. W., with intent to defraud the plaintiff of his rights under the award ; and the prayer of the bill was that the sheriff's deed to D. C. might be decreed to be fraudulent and void. *Held*, that inasmuch as it was alleged that D. C. was only the trustee of a naked trust, and that the property was bought at the sheriff's sale by the original defendants, or some of them, in the name of D. C., to enable them the more effectually to accomplish the original fraudulent design, the plaintiff could maintain his supplemental bill.

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3. The defendants who answered the original bill having in their answers specifically alleged a want of equity in the plaintiff's case: *Held*, that it was proper to consider and decide on demurrer to the supplemental bill the question thus raised.

The opinion of the Chancellor is reported in 5 *C. E. Green* 393.

Mr. F. B. Chetwood and *Mr. B. Williamson*, for appellant.

Mr. R. S. Green and *Mr. C. Parker*, for respondents.

The opinion of the court was delivered by

DALRIMPLE, J.

The questions at issue in this case arise upon demurrer to plaintiff's supplemental bill.

The facts of the case, so far as necessary to a proper understanding of the points involved are, that the plaintiff, in or about the year 1867, brought suit against John T. Winans, in the Supreme Court of this state, upon a money demand. On the 2d day of April, 1867, the parties to that suit submitted the matters in difference therein to arbitration. In the agreement of submission are the following clauses or stipulations: "In case the said arbitrators award that the said John T. Winans pay any amount to the said Michael M. Williams, the said John T. Winans agrees to make and execute his bond to the said Michael M. Williams in the penal sum of double the amount so awarded to be paid to the said Williams by the said John T. Winans, conditioned to pay the amount of such award in instalments of one-fifth of the said amount each, as follows: one-fifth thereof in cash, and the balance in yearly instalments of one-fifth each, with interest on the same at seven per cent. per annum, payable half-yearly; and if any instalment shall remain unpaid for the space of ten days after the same may become due, then the whole amount remaining unpaid to become due and payable at the option of the said Williams. And the said parties do agree that in case the said John T. Winans shall not, within thirty days after the said award

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shall be made, pay one-fifth of the said amount so awarded, and execute and deliver the bond in manner and form as above mentioned, and execute and deliver to the said Williams a mortgage on the one hundred acres of land opposite his house to secure the payment of the same, or pay the amount of the said award, less five hundred dollars, then this submission may be made a rule of the Supreme Court of the state of New Jersey, upon the application of either party."

On the 31st of December, 1867, the arbitrators awarded that John T. Winans should pay the plaintiff the sum of \$5853.70. Very shortly after the making of this award, Winans, as charged by the plaintiff, encumbered and conveyed the lands mentioned in the agreement of submission, with intent to defraud the plaintiff of the mortgage to which by the agreement of submission he was entitled. On the 10th of February, 1868, plaintiff filed his bill against John T. Winans and the alleged fraudulent encumbrancers and grantees, praying that Winans may be specifically decreed to perform his agreement and execute a mortgage on the one hundred acres of land, and that the mortgages and conveyances, made with the intent aforesaid, may be declared fraudulent as against the plaintiff. All the defendants, except one, answered. The answers insist that by the agreement of submission the plaintiff is not entitled to a mortgage, and pray the same benefit of this defence as if the defendants had demurred to the bill for want of equity. The plaintiff filed a replication to the answer, and took a decree *pro confesso* against the defendant who had not answered.

Afterwards, on the 23d of November, 1868, the plaintiff filed a supplemental bill against all the defendants and one David Cutter, in which it is charged, in substance, that on or about the 15th of October, 1868, the defendants in the original bill, or some of them, by virtue of two judgments against John T. Winans, one of which was recovered prior to the date of the said agreement of submission, and the other

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subsequent thereto, but before the award of submission, procured a sheriff's sale of the said lands, with intent to defraud the plaintiff of his rights under said award.

The supplemental bill further alleges that the judgments had been paid before the sheriff's sale, and that the defendants in the original bill, or some of them, had at the sheriff's sale bought the property in the name of Cutter, but without his knowledge or consent, and that he, though holding the legal title to the property, did not claim any beneficial interest therein, but was only the trustee of a naked trust, created by the original defendants, or some of them, to enable them the more effectually to accomplish the original fraudulent design, which was to hinder, delay, and defeat the plaintiff in the enforcement of his award. The bill prays an answer to the matters therein set up, and that the sheriff's deed to Cutter may be decreed to be fraudulent and void, and set aside; or, if more equitable, that the said David Cutter may be declared to be a trustee, holding the sheriff's deed and the title to the lands thereby conveyed for the benefit of the plaintiff to secure his rights under the agreement and award. The defendants insist that these new facts are not the subject matter of a supplemental bill, but make a case inconsistent with that set up by the original bill. The argument is that the judgments being prior in point of time to the award, a sale under them would give a title paramount to that of Winans as it existed at the date of the award, and would consequently overthrow and render of no avail the encumbrances and conveyances made and given by Winans subsequent to the award. In other words, that the proceedings under the judgments are necessarily hostile to, and overthrow the deeds and mortgages which are in controversy in the original suit; and that Cutter, who has been invested with the legal title, free and clear of the fraudulent conveyances in question, cannot be brought in by supplemental bill, because he is in no wise concerned in the matters litigated in the original bill, and is not bound by the answers and proceedings therein.

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It is apparent that the plaintiff's original suit, if he should succeed therein, will be fruitless, unless Cutter is made a party defendant. On the other hand, if the plaintiff should now discontinue or suspend proceedings in his original suit, and proceed in a separate suit against Cutter, and succeed, he would be compelled to re-commence the old controversy, in order to obtain adequate relief. If in a suit against Cutter the sheriff's deed should be declared fraudulent and void, and set aside, the plaintiff would stand precisely where he did when he commenced the first suit. The plaintiff's remedy must, therefore, be incomplete until he can litigate as well with Cutter as with the original defendants. The question to be decided is whether such litigation must embrace two separate suits, or may be carried on under the original and supplemental bills now on file. In the case of *Decker v. Caskey*, *Saxt.* 433, Chief Justice Ewing, sitting for the Chancellor, says: "It is the desire, as well as the duty of this court, never to do justice by halves—never merely to beget business for another court—and never, when a case is fairly within its jurisdiction, to leave open the door for litigation further, or in any other place, if it can possibly be here closed." See also, on this point, *Shannon v. Marselis*, *Saxt.* 424.

It is the duty of the court to settle and determine if practicable, in one suit, the rights in and to the hundred acres of land in question of the plaintiff and defendants in the original suit. It is immaterial whether the defendants claim a legal or equitable estate. The rule above referred to is not relaxed because the defendants may claim a trust estate, while the legal title stands for their use and benefit in the name of another. I presume it will be admitted, that if the plaintiff could maintain an original bill against the defendants and Cutter jointly, Cutter may now be brought in by supplemental bill; and I think it equally clear, that if it had appeared that Cutter's title, derived from the sheriff's sale, was really adverse to the title of the other defendants, and that he claimed in fact, as well as by appearance, in hostility

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to them, he could neither be brought into this suit by supplemental bill, nor joined with the other defendants in an original bill. In that case their rights would be separate and distinct, proceeding from different sources, and not dependent upon or connected with each other, and the defendants in the original bill could have no interest in Cutter's title, but would be interested to defeat and overthrow it. A bill filed against them all, would therefore be open to the objection of multifariousness. But in this case it is alleged that Cutter claims nothing beyond a naked trust, and that the original defendants, or some of them, concocted the sheriff's sale and purchased the property, and took a deed therefor in the name of Cutter, without even his knowledge or consent. The plaintiff's case as made by the original and supplemental bill is, in short, that the defendants in interest undertook first to defeat plaintiff by means of the fraudulent encumbrances and conveyances stated and brought in question in the original bill; and pending the suit brought by the plaintiff for relief against these encumbrances and conveyances, the defendants, in order more surely to effect their purpose and increase the embarrassments of the plaintiff, procured, by fraud, a sheriff's sale of the property, and thereby shifted the legal title from themselves to Cutter, who holds the same for the sole use and benefit of the other defendants.

If, in order to give the plaintiff full relief, Cutter is a necessary party, and has, as the mere agent or trustee of the parties with whom the plaintiff is already litigating, acquired title to the property in controversy pending the suit, he may be brought in and proceeded against by supplemental bill. It is true that he is not, technically, the assignee of the rights of the other defendants which were at first the subject matter of litigation. The real defendants have made no formal assignment, but merely changed their ground, and thus the case has been made to assume a new phase. Cutter, without any real interest, is now the central figure. The original defendants have, since the filing of the first bill, taken a new proceeding, by which they claim that their

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original rights have been suspended, and their title changed. The plaintiff contends that the new, like the old title, is tainted with fraud. I do not think that the fact that the defendants have caused the conveyance by the sheriff to be made to Cutter, and not to themselves directly, under the circumstances, changes the rights of the parties or necessitates a new suit. I hold that the plaintiff may proceed against Cutter and the other defendants, and have the benefit of the original suit, not by strict supplemental bill, but by original bill in the nature of a supplemental bill. The bill demurred to is original as to Cutter, and as to the new facts alleged. It is supplemental because the matters sought to be put in controversy have arisen *pendent lite*, whereby to prevent an undue multiplicity of suits, and give the plaintiff full relief, it has become necessary to allege such newly arisen matters and bring in Cutter who is nominally connected therewith. If the original defendants had taken the sheriff's deed to themselves directly, I think it must be admitted that a supplemental bill could have been maintained against them. That they have chosen to cover up their tracks so far as possible by having the title made to a trustee, cannot subject the plaintiff to the expense of two separate suits. The principles of equity pleading and practice applicable to, and by which this case must be governed, will be found in the following extracts from *Story's Eq. Pl.*, §§ 335-36: "If," says the learned author, "new charges are required to be made in order to obtain a further discovery, or a material fact is required to be put in issue, which was not in the cause before, such as a charge of fraud or a new title, the object cannot be obtained but by a supplemental bill. So new parties, when necessary, may be added by a supplemental bill where the proceedings are in a state in which the object cannot be obtained in any other way. In the next place, when new events or new matters have occurred since the filing of the bill, a supplemental bill is, in many cases, the proper mode of bringing them before the court; for, generally such facts cannot be introduced by way

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of amendment to the bill. But here we are to understand that such new events, or new matters, do not change the rights or interests of the parties before the court, (for then, properly speaking, the bill is not simply a supplemental bill) but they merely refer to and support the rights and interests already in the bill. A supplemental bill may also be brought, not only to insist upon the relief already prayed for in the original bill, but upon other relief, where facts which have since occurred may require it." I do not think it necessary to attempt a discussion of the numerous adjudged cases relating to the point under consideration. Most, if not all of them, will be found in the notes to sections 332 to 352, of the work referred to, where the subject is discussed with the author's usual learning and ability. He says, in section 345, that the prominent distinction between supplemental bills, correctly speaking, and original bills in the nature of supplemental bills, is that a supplemental bill is properly applicable to those cases only where the same parties or the same interests remain before the court; whereas, an original bill in the nature of a supplemental bill, is properly applicable when new parties, with new interests, arising from events since the institution of the suit, are brought before the court. Keeping in mind this distinction, and the fact that the interest of the original defendants in the property in controversy has not ceased, but that they have only acquired means to hold the same additional to their original title; and further, that the litigation is still substantially between the original parties, I think the conclusion to which the court has arrived, that the plaintiff is entitled to his supplemental bill, will be found to be correct.

The defendants further insist that the demurrers must be sustained, because the plaintiff on the face of his bill shows no good claim to equitable relief. Their allegation is, that the agreement of submission does not give the plaintiff the right to a mortgage, except at the option of Winans, and, having no lien upon the land, the plaintiff stands simply in the position of a creditor at large. Though the plaintiff

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holds the award of the arbitrators in his favor, and that may be considered as the judgment of a tribunal of the parties' own choice, yet the plaintiff, not having exhausted his remedy at law, cannot stand upon his award alone and ask a court of equity to enforce it. *Edgar v. Clevenger*, 1 *Green's Ch.* 258; *Green v. Tantum*, 4 *C. E. Green* 107; *S. C.*, on appeal, 6 *C. E. Green* 364. If, therefore, the plaintiff has not, in his agreement of submission, a covenant on the part of John T. Winans to secure the amount awarded by a mortgage, neither the original nor supplemental bill can be maintained. This point does not seem to have been raised in the court below, as no allusion is made to it in the opinion of the Chancellor. I think, however, the question now fairly arises and ought to be decided, because there would be no propriety in sending the parties back to the Court of Chancery to try the question of fraud, if the plaintiff, if successful in that issue, must, nevertheless, eventually fail because he has no standing in court. The demurrers are to the supplemental bill only. They cannot be made to reach the original bill, which has been answered. But the plaintiff's want of equity, as shown by his original bill, was alleged by the defendants who answered. The objection having been specifically taken, and the ground of it appearing on the plaintiff's bill, I do not see how we can avoid meeting and disposing of it.

Looking to the mere letter of the agreement, and reading each sentence by itself, the defendants' construction of it is correct. But reading it as a whole, I think the context shows that the intention of the parties was that Winans should be bound to pay one-fifth of the amount of the award in cash, and secure the balance by bond and mortgage, in thirty days after the date of the award, having the option to pay down the whole amount, less five hundred dollars, which the plaintiff was then to abate. There is a stipulation superadded, that in case Winans failed to fulfill his agreement or pay the whole amount after the abatement of five hundred dollars, the agreement of submission might be made a rule of court.

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The defendants' construction of the agreement is that Winans only agreed to pay one-fifth of the amount awarded, and give bond for the balance with the privilege of securing the bond by mortgage, or paying down the whole amount, less the five hundred dollars, and thereby preventing the submission being made a rule of court. This construction would render the rule of court entirely useless. Winans could only be punished by the court for violation of his agreement. The agreement would be fully performed by payment of one-fifth of the amount awarded, and execution and delivery of an unsecured bond for the balance. The result would be that the plaintiff, a creditor of Winans to near \$6000, after giving up his pending suit, and incurring the expenses of an arbitration, would, in the end, collect only one-fifth of the amount due him, and be obliged to accept Winans' bond for the balance, payable in four equal annual instalments. If the submission should then be made a rule of court, it would be after all covenants had been performed on the part of Winans. The non-payment of his bond could hardly be held a contempt of court. If he was by his agreement only bound to give the bond, the court could only require him to do that much. It could not go further, and require him, under pain of being considered in contempt, to pay his bond. I think it is not going too far to hold that it is fairly to be inferred from the terms of the contract that it was within the contemplation of the parties that Winans should be bound to give a mortgage, as well as bond. If not, why did the parties agree that, on failure to give the mortgage, the submission should be made a rule of court, unless the whole amount, less the five hundred dollars to be abated, was paid down? They must have been under the erroneous impression that after the execution and delivery of the bond, the court could, for breach of the conditions, punish as for a contempt; or that Winans, having agreed to give the mortgage, might be proceeded against for his breach of agreement in the court of which the submission was a rule, or otherwise. The meaning which the defendants

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would attach to the agreement, stands upon the letter alone. It is unreasonable, and not in accordance with what it is evident the parties designed to accomplish: that was to end the pending litigation in court, and transfer it to a tribunal of their own choice; the plaintiff agreeing to give Winans day of payment for four-fifths of the amount which might be awarded him; Winans, on his part, to bind himself to pay in cash one-fifth of the award within thirty days, and to secure the balance by bond and mortgage, with the option to satisfy the whole award by paying down the amount awarded, less \$500. It is admitted that we are compelled to arrive at the conclusion that the plaintiff is entitled to a mortgage by construction, and that there is some ambiguity in the terms of the agreement in this respect; yet there is no doubt, either as to the parties to the agreement, the amount due the plaintiff, or the lands referred to. I cannot see why the plaintiff is not entitled to the benefit of his agreement, if we believe that, by a fair construction of it, he is entitled to a mortgage. We cannot say that this contract cannot be understood, nor that it is incapable of any certain construction.

The conclusion being that the plaintiff is entitled to a mortgage, and that the supplemental suit is well brought, the decree below must be reversed and a decree entered overruling the demurrers.

The whole court concurred.

NOVEMBER TERM, 1871.

MORGAN and others, appellants, and ROSE and others, respondents.

1. The act to incorporate the trustees of religious societies does not, *proprio vigore*, do more than vest the legal title in the ecclesiastical property in such trustees.

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2. The statute was designed to create a simple trust, so that the trustees must hold and dispose of the property in conformity to the directions of their *cestuis que trust*, who may be, either the congregation, or certain officials, according to the rules or discipline of the particular church or society.

3. Where the question is whether a certain act done by the trustees in their corporate capacity, be within or without their power, the corporation is a proper and necessary party ; but where such act has been enjoined, the injunction will not necessarily be dissolved on account of the non-joinder of such party.

4. The general rule is that an appeal will lie from all orders either granting, refusing, sustaining, or dissolving injunctions.

Mr. P. L. Voorhees and *Mr. Browning*, for appellants.

Mr. A. C. Scovel and *Mr. J. Wilson*, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The complainants in this suit are members of "The Baptist Church of Camden." One of them was, at the time of the commencement of these proceedings, the pastor, and four of the others were trustees of this church. The bill is exhibited in behalf of the complainants, and such other members as may choose to come in. Of the defendants, five claim to be trustees, the rest being members of the congregation. On the 3d of June, 1869, those of the defendants who claim to be trustees met at the church building, on a call of the board, and passed a resolution, wherein, after referring to a certain resignation of the pastor, and reciting that "whereas, as well before as since such resignation, feelings of discontent touching the said pastor threatened and do threaten to disturb the peace of the church, which may lead to violence among its members," it was declared that, "in order to avoid all disorderly or unchristian proceedings, at times of public worship or business, this board deem it prudent, and therefore order, that the church edifice be closed against any meetings for public worship or business until after the first day of July next, and the further order of this board," &c. In conformity with this resolution, the church was closed, and the congre-

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gation prevented from its use on Sundays and at other times. Subsequently, the complainants getting possession of this building, caused it to be thrown open to the congregation, and it is the main purpose of the present bill to restrain the defendants, by injunction, from closing this meeting house, and preventing its being used as a place of worship and business. An injunction having been granted, was retained on a motion, founded on the bill and answer, to dissolve. The present appeal brings up for review this action of the Chancellor.

The claim of these appellants to a dissolution of this injunction must, in my opinion, rest entirely on the foundation that they possess, as the trustees of the church in question, the authority to decide when, and under what circumstances, the church edifice is to be used by the congregation. Upon the argument the case of the appellants was properly put upon this ground, and it was strenuously urged that the control of the trustees over the meeting-house was unlimited, except to the extent that they were bound to exercise a fair and honest judgment upon the subject. This same position is assumed in the answer, and the substantial question therefore to be solved, is as to the extent of the power of these trustees over this place of worship.

"The Baptist Church of Camden," has been duly incorporated by force of the provisions of the act of the legislature of this state, entitled "an act to incorporate trustees of religious societies." *Nix. Dig.* 802. As the present defendants do not pretend that they have any authority except that which they derive from this statutory source, the language and meaning of this law is the primary subject of interest in this investigation.

The title of this statute appears to me very clearly to indicate its purpose, which is expressed to be "to incorporate trustees of religious societies." It is not its office to incorporate the society itself, but to confer certain definite franchises on a select body of such society. With this view, the first section of the act provides that every "religious society or

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congregation of christians" is authorized to assemble upon a certain notice, and, by a plurality of voices of those present to elect any number not exceeding seven as trustees. The same section then declares that the trustees thus chosen are thereby constituted a "body politic and corporate in law." It will be observed that it is but a chosen part of the society that is converted into a corporation. There are then other provisions adapted to the purpose of continuing the line of trustees, and settling certain minor details. But it is the third section which confers upon the trustees all the power which they possess. This is its language: "The said trustees and their successors shall, by such name of incorporation, be able and capable to acquire, purchase, receive, have and hold any lands, tenements, hereditaments, legacies, donations, moneys, goods, and chattels, in trust for the use of the said society or congregation, to any amount in value not exceeding two thousand dollars a year, and the same, or any part thereof, to sell, grant, assign, demise, alien, and dispose of, to sue and be sued, implead and be impleaded, in any court of law or equity; to make use of a common seal, and the same to alter and renew at their pleasure."

The language here used is altogether certain and unambiguous. The legislative intent is plainly stated. The provision is, in substance, this: the temporalities of the church are put in trust, without limitations, for the use of the congregation. This being the clear intent, the only inquiry is as to the legal effect of such a disposition of property. If the learned counsel of the appellants had not expressed, on the argument, the views which they did, I should have thought that this was a subject concerning which, among lawyers, a difference of opinion could not exist. But notwithstanding all the respect which I entertain for the views thus presented, on account of the source whence they proceeded, my reflections on the subject have served but to confirm my original impressions, that such views are unfounded in principle and irreconcilable with all authority. That this statute, *proprio vigore*, creates merely

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a simple trust, appears to me incontestable. This kind of interest arises whenever property is vested in one person upon trust for another, and the nature of the trust, not being defined in the settlement, is left to the construction of the law. This is precisely what the statute under examination does; the property is put in the hands of the trustees in trust for the congregation; but there is not a word in the act which tends towards a definition, or description, or limitation of such trust; and I do not know that in any dictum or in any adjudged case, a doubt has ever been expressed as to the fact that, by force of such a settlement, the trustee is a mere depositary of the property, and that the *cestui que trust* has both the *jus habendi*, or the right to be put in the actual possession of the estate, and the *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate, as the *cestui que trust* directs. It would be superfluous to refer to books as vouchers of so familiar a doctrine. No one, I think, at all versed in this branch of the law, can doubt that the language of the statute, if found in a will or a deed, would have the effect thus indicated. A

- testamentary disposition vesting real and personal estate in A, coupled with a power of sale, in trust for B, would place in A nothing but the dry legal title, which it would be his duty to hold in entire subservience to the wishes and directions of B. And that, I think, was the precise purpose of the statute in question. It was not the legislative design to establish one uniform government over the temporalities of each church that became incorporated under its provisions, but simply to provide flexible machinery, whereby each congregation could hold, protect, and dispose of its property in such manner, and for such purposes as might seem to it best. I have no idea that the framers of this act intended that each society of christians who availed themselves of its privileges, gave up, by such act, to the trustees thus selected, all dominion over their property, real and personal; but, on the contrary, I deem the purpose was, and such purpose seems to me a most wise one, to put it in the power of every such

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society to transmit its property in perpetual succession, by investing it with the requisite corporate capacities, leaving it to be disposed of, through this instrumentality, by either the whole congregation, or certain parts of it, or by such of its functionaries as should be clothed with such power by force of the ecclesiastical organization to which they might belong. I think, therefore, these trustees, as the holders of a simple trust, have no right, in equity, to control or dispose of the church property except as directed so to do by the *cestui que trust*. Whether the power to give such direction resides in the whole congregation, or in particular members, or in special officials, depends, in each instance, on the established usages or express regulations of the individual congregation, or of that wider ecclesiastical organization of which such congregation is a branch. But, as has been already stated, the whole effect of this statute is to create a general trust, making the trustees bare depositaries of the legal estate in the temporalities.

Nor have I found anything in the adjudged cases, nor any dictum contained in such cases, which conflicts, in any respect, with this conclusion. Indeed, in the opinion read in the case of *Den v. Pilling*, 4 Zab. 661, a construction is put upon this statute precisely similar to that above expressed. Its words, upon this point, are these: "It cannot be doubted, however, that the trustees of all religious societies hold the property subject to its appropriate use, and have no legal right to determine when the religious meetings shall be held, or who shall officiate, unless such power is given to them by the rules and discipline of the denomination to which they belong, and that they may be compelled, by proper proceedings at law or in equity, to fulfill their duty." It is true that this expression of opinion, coming into the case as a side remark, has not the force of a direct adjudication, but it has peculiar weight from the circumstance that, from the forcible language used, it is obvious that it did not occur to the judicial mind, that this act was susceptible of any other interpretation.

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Upon the argument much stress was laid on certain expressions made use of in the opinion in the case of *Van Houten v. The First Reformed Dutch Church*, 2 C. E. Green 126; but an examination of the case will show that these expressions can be made to appear to favor the views of the appellants, only by being cited as disjointed fragments and separated from the context to which they belong. Some parts of this opinion, taken by themselves, appear, at first sight, to countenance the doctrine that these statutory trustees are competent to control at their discretion, and to dispose of the church property; but upon a closer scrutiny, it will be perceived that such parts relate to those particular trustees whose authority was then the subject of inquiry. That controversy was between the pewholders and the trustees, the latter being about to take down the church building, a proceeding opposed by the former class of persons, and the decision was that the power of the trustees was plenary for that and all other purposes relating to the ecclesiastical property. But the Chancellor does not say, nor intimate, that such authority was conferred by the statute; but, to the contrary, he clearly deduces such power from the particular regimen of the Reformed Dutch Church. On this point he thus plainly expresses himself: "Whether the interests of the church and congregation require that the church should be removed to another locality, is a question which the authorities of the state and of the *church* have wisely committed to the judgment and discretion of its board of trustees. In the Reformed Dutch Church in this state, the trust has been delegated to the consistory, a body consisting of the pastor, deacons, and elders of the church, the guardians at once of its spiritual and temporal interests." It was this dominion over the church property which the Chancellor held was not to be controlled by the wishes of the congregation, or of any branch of it; but it will be noticed that this was a dominion which proceeded not only from the statute, but, in fact, from the church government. The defendants in that case were, it is true, trustees possessing,

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by force of the statutory law, the legal title; but they were likewise the consistory, and as such, clothed with absolute control over the ecclesiastical property. This case harmonizes with the views which I have already expressed with respect to the proper signification of the statute in question.

The cases of *Van Horn v. Talmage*, 4 *Halst. Ch.* 108, and *Doremus v. The Dutch Reformed Church*, 2 *Green's Ch.* 332, rest upon the same basis as that of the case to which reference has just been made; for they each involve the question as to the authority of trustees who are also the consistory of the Dutch Reformed Church, which, emanating as it does from the statute and the church polity, is, it must be admitted, unqualified and absolute. These cases, therefore, do not favor the contention of the counsel of the appellants. With respect to the New York decisions which were cited, they can throw but little light on the subject, from the circumstance that the statute of that state bears but a general resemblance to our own. So far, however, as such adjudications are applicable to the present topic of consideration, they are in aid of the conclusion that the authority of the religious society is supreme, except to the extent that such authority is taken away by the force of the legislative act.

My conclusion is that the trustees, who are appellants in this case, did not acquire, by the mere act of incorporation, the authority which they claim, to close the church building at their discretion. Nor can it be claimed that they are invested with such power by reason of the usages or discipline of the church which, in some respects, they represent. As this case is now presented to this court, it is clear that it is for the pastor and congregation to decide when the church shall be opened and when it shall be closed. An affidavit annexed to the bill states that the pastor and the society are the depositaries of this authority, according to the "customs, rules, and discipline of said church," and this affidavit stands in full force, without any attempt at contradiction or refutation. The plea advanced in the answer, that the act of the trustees in closing the meeting-house had the approval of

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certain members of the church, as appears by their petition among the papers before the court, can have no effect. The members of the church, or of the spiritual body, can have no more control over the church edifice, or the times of worship, than the rest of the congregation; and even if such power resided in such members, their votes could not be legally taken except at a meeting regularly convened.

The result to which I have thus come, dispenses with the necessity of discussing the question whether, admitting the legal power of these appellants, as trustees, to close the church at their will, such authority was fairly exercised in this particular instance. I assume, for present purposes, that these officers were actuated by proper motives, and on that assumption I arrive at the conclusion already expressed, that they had no legal competency to do the act now in controversy. This view disposes of the merits of this litigation in its present stage.

But the case of the appellants was, in the next place, rested on an objection to the form of the complainants' proceedings. In the answer it is alleged that the corporate body, "The Baptist Church of Camden," is a necessary party to this suit, and that the omission of such party invalidates the order which was granted, directing an injunction to issue. Upon reflection, it seems to me that the corporation is a party indispensable to the legal propriety of this procedure. The act which is complained of, and which forms the gravamen of the bill, was done by the appellants *colore officii*. The defence is placed upon the claim that the church was closed by a regular order of the corporate authority, and one of the principal questions in the controversy, therefore, is as to the existence of such corporate authority. If the corporation can be interested in any question, it must of necessity be so in this question. It has, certainly, a right to be heard in its own proper person, when the extent of its authority is the matter to be adjudged. Without its presence in the suit, the decree, if adverse, will not bind it; nor, if in its favor, can it claim for such decree that quality of conclusiveness which,

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in legal theory, is deemed to attach to every final determination of a court. I think, in this case, the church should have been made a party in its corporate capacity, a conclusion which will be found to harmonize with the opinion of Chancellor Walworth, in the case of *Lawyer v. Cipperly*, 7 Paige 282.

Upon the argument it was assumed that if this defect existed, the injunction must fall. But this is a fallacy. The general principle undeniably is, that a decree or order will not be made, affecting the rights of an absent party. But this rule, like most general rules, is liable to the control of the equities of the particular case, for it is but seldom that, in a court of equity, a mere form can defeat the ends of justice. The non-joinder of an essential party does not of necessity lead to the dissolution of an injunction; the general rule is that it will have that effect, but such rule is not universal. Even where a bill is demurred to on the ground of the want of proper parties, and such demurrer is sustained, the injunction does not inevitably fall, for in some cases the court will give leave to amend without prejudice to the injunction. Several cases to this effect are cited in Mr. Kerr's *Treatise on Injunctions*, p. 635. So it is correctly said in the same work, page 208, that "where there is a case for an injunction, and the injunction will operate for the benefit of parties not before the court, the absence of those parties, though a ground of demurrer to the bill, will not prevent the court from interfering." I think the true principle is, that when the injunction will have the effect of injuring, in any material respect, the rights of absent persons, the court will not, unless in case of special necessity, interfere with such rights, but that when the absence of persons as parties constitutes, so far as the granting or refusing of the injunction is concerned, a formal rather than a substantial defect, there is no ground arising from such fact for a refusal of the temporary aid of the court, if such aid appears, under the circumstances, to be equitable. The present case is a strong illustration of the propriety of these limitations on the usual rule

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which exacts the joinder of essential parties. The defect now complained of is that the corporation has not been subpoenaed, but all the corporators, who are the trustees, are before the court; there can be no pretence that, on the motion to dissolve this injunction, the joinder of the corporate body could have had the slightest effect; every circumstance of defence which that body could have interposed, has been presented by the trustees; and upon motion it would be a matter quite of course to permit the complainants to amend their bill on the point to which exception is taken. Any peremptory rule which would require the Chancellor, under such conditions of the case, to dissolve an injunction substantially necessary for the protection of property or equitable rights, would be a blot upon the legal system, as it would injuriously subordinate equity to mere mode of proceeding. In my opinion, the Chancellor rightly exercised his discretion in refusing to withdraw, on this technical ground, the protective arm of the court.

There was a point made on the part of the respondents in the argument before us, that the injunction order in this case was not a proper subject of appeal. This objection under the view heretofore expressed, has become of no importance in this inquiry; but as a matter of practice it is of moment, and on that account has been considered by the court, and our unanimous opinion is that an appeal will lie from an order of this character. We consider the general rule, settled by the practice and recognized in the decisions, is that all orders either granting, refusing, sustaining or dissolving injunctions are appealable, unless in those few and exceptional cases where an order is so temporary in its operation, or so slightly affects the interest of the party on whom it operates, that such party cannot be said to be aggrieved by such order. This class of excepted cases belongs to the category of interlocutory orders in the cause, or orders resting in the discretion of the Chancellor. Of this latter kind, Chancellor Green appears to have considered the denial of the motion for an injunction in the case of the *Attorney-General v. The City of*

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Paterson, 1 *Stockt.* 627. But that most orders appertaining to injunctions are appealable, is settled by the practice of this court, as will appear from the following cases: *Chegary v. Scofield*, 1 *Halst. Ch.* 525; *Doughty v. Somerville R. Co.*, 3 *Halst. Ch.* 629; *Attorney-General v. Paterson*, 1 *Stockt.* 628; 2 *McCarter* 501.

The order appealed from should be affirmed, with costs.

The whole court concurred.

LANDRUM and others, appellants, and KNOWLES, respondent.

A policy of insurance was taken by a wife on the life of her husband, in favor of and made payable to her children. After the payment of several premiums, she assigned this policy in payment of a debt of her husband, and thereupon the assignee paid several successive premiums. After the death of the husband the children filed their bill claiming the whole sum insured. *Held*, that they were entitled only to the value of the policy at the time of its assignment, on the ground that the gift from the mother to them was executed only to that extent.

Mr. A. Kirkpatrick (with whom was *Mr. T. S. Alexander*), for appellants.

Mr. Dixon, for respondent.

The opinion of the court was delivered by
THE CHIEF JUSTICE.

The end of this bill is to compel the payment to the complainants of certain moneys due on a policy of insurance. This contract with the insurance company had been entered into by the mother of the complainants, who are infants, and bears date the 28th of December, 1850. The consideration was the payment of \$56 annually, and the insurance was on the life of Samuel G. Landrum, and was for the "sole use of the children of the said Lucy and Samuel G. Landrum;"

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the agreement of the company being with the "said assured," that they will "well and truly pay, or cause to be paid, the said sum insured to the said assured, or their assigns," &c. On the 20th of February, 1860, Lucy A. Landrum, the mother of the complainants, under her hand and seal, and with the assent of her husband, assigned this policy to the respondent, in payment of a debt due to him from the husband. Lucy A. Landrum had paid the premiums due on the policy up to the 28th day of December, 1860, the last payment by her having been made on the 28th day of December, 1859. Subsequently to this payment, the respondent had paid the premiums. Samuel G. Landrum, whose life was insured, died in June, 1869. The insurance company, which was a party to the suit, had declined to pay the moneys due until it should be ascertained to which of the claimants the debt was legally due.

The Chancellor decreed that the complainants were entitled to the "cash value of the policy of insurance in question in this cause, at the time the policy ceased to be kept alive by the payment of the premiums by Lucy A. Landrum, or her husband, Samuel G. Landrum, to wit, on the 28th day of December, 1860," and which sum was to be determined by the rules of the company, the residue of the money owing on the policy being ordered to be paid to the respondent. It is from the latter branch of this decree that the present appeal has been taken.

The claim of the appellants is that they are entitled to the whole of the money due on this policy; the ground of this demand being that the policy was made for their benefit, and was payable to them, and that the gift having been completely executed by their mother could not be revoked by her, and that, consequently, the assignment by her to the respondent is invalid. This contention is controverted by the other side, on the grounds, that as the consideration moved exclusively from the mother, the appellants, who are her children, could not acquire any interest in the policy as against her, and that as they are mere volunteers, without

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having paid any consideration for the interest which they claim, a court of equity will not extend to them any assistance. But this view taken by the counsel of the respondents cannot be sustained. It falls to the ground from the fact that the gift of an interest in this insurance has, at least to a considerable extent, been fully executed. There can be no question as to the equitable rule, that whenever any thing or chose in action has been completely transferred or assigned, a court of chancery will give effect to such act, even though it be purely voluntary. The principle was marked out with nice discrimination, in *Ellison v. Ellison*, 6 Ves. 656, by Lord Eldon, who said: "I take the distinction to be, that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court." Now, in the present instance, the interest in this policy was effectually transferred to these appellants, for by its very terms it is made payable to them, and it is difficult to conceive what ceremony or fact is wanting to the perfection of the gift to them. The mother pays the premium for the use and benefit of the children, and the insurance company, at her instance, in the policy, enters into an agreement to pay the insurance money to them. The gift to the children is voluntary, but, very clearly, it is completely executed as a gift by the mother from whom it proceeds. In *Fortescue v. Barnett*, 3 Mylne & Keene 36, the voluntary gift was not more entirely completed. This case is most important in the present examination, being in most of its features similar to the one now before us, though I think in one essential respect, which in the sequel will be noticed, is to be distinguished.

The facts were briefly these: A man made a voluntary

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assignment of a policy of insurance, which he held upon his own life, to trustees for the benefit of his sister and her children, if she or they should outlive him. The deed was delivered to the trustees, but the grantor kept the policy in his own possession. No notice of the assignment having been given to the insurance office, the grantor surrendered the policy for a valuable consideration. The Master of the Rolls held that the assignment of the policy, though voluntary, having been completely executed, was binding, and that the grantor must answer to the *cestuis que trust* for the value of the policy. With respect to the point of the completeness of the execution of the gift, I do not think the facts in the case thus cited were stronger than the facts in the present case. The assignment to trustees was not more unequivocal as to intention, or more final with respect to mode, than the circumstance of putting the policy in the name of these appellants. In both instances equally, nothing remained to be done to pass the interest assigned to the beneficiaries. And this authority would be very forcible in favor of the entire claim of the appellants, if it were not for a particular circumstance, and which is the distinguishing feature before adverted to. That circumstance is, that the grantor in the case cited covenanted with the trustees to "pay and keep up the annual premiums payable upon the policy." This, it seems to me, is an important ingredient of the case, and it is probable that it is the absence of this element which has led the Chancellor to make a decree in favor of the appellants in its present qualified form. This decree is shaped upon the idea that so long as the policy was kept alive by the premiums paid by the mother of the appellants, it belonged, by the gift of the mother, to them. To this extent this result is sustained by the case just referred to of *Fortescue v. Barnett*. By taking the policy in its form payable to the appellants, and by the payment of these premiums, the mother passed definitively to the appellants, an interest in the policy to the value of such payments. To this extent the transaction was finished and executed. But beyond this

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value nothing could pass to the appellants but by a further act of the mother, and which act was entirely voluntary. She had not even agreed to perform such act. Whatever premiums she might have paid, beyond those actually paid, would have been entirely gratuitous. To this part of the present case, then, the decision just stated does not apply. The point is a nice one, and it seems to me there are no precedents, for the American cases cited can have but little weight, as they all rest, in a great degree, on statutory considerations. The Chancellor's view is certainly an equitable one; it gives to the appellants the full value of the policy up to the time it ceased to be kept alive by their mother. At that point the mother indicated, by the assignment of the policy, her intention to make no more payments in their favor, and unless the respondent had continued to keep the policy alive it would have been forfeited with respect to all persons holding an interest in it. It is by no means certain that this assignment has not been an advantage to the appellants, as otherwise the policy might have fallen in. The respondent kept this insurance alive for his own benefit, having acquired an interest in it by the payment of a valuable consideration. As the intention was clear, the mere form in which the interest was passed to the respondent cannot, in a court of equity, affect the substantial rights of the parties. The result in the court below goes upon the ground that the mother of these appellants gave to them the entire interest in this policy, which she herself had paid for; that, to this extent, the gift was executed, and consequently could be enforced in equity; but that the acquisition of a further interest by the payment of subsequent premiums was altogether executory and voluntary, and that such interest was not acquired by her and cannot be claimed by her beneficiaries. As I have said, this result appears to me to meet fully the equity of the case; and as it also, in my judgment, is in harmony with correct theory, I shall vote to affirm the decree of the Chancellor, with costs.

The whole court concurred.

Flavell v. Flavell.Atwater v. Underhill.

FLAVELL, appellant, and FLAVELL, respondent.

The bill in this cause was filed for a divorce on the ground of adultery. The Chancellor granted the divorce. (5 *C. E. Green* 211.) The defendant appealed.

Mr. G. W. Cummings, for appellant.

Mr. J. W. Taylor, for respondent.

No opinion was read. The decree was affirmed.

For affirmance—BEASLEY, C. J., BEDLE, DEPUE, SCUDDER, VAN SYCKEL, WALES. 6.

For reversal—CLEMENT, DALRIMPLE, LATHROP, OGDEN, OLDEN, WOODHULL. 6.

MARCH TERM, 1872.

ATWATER and wife, appellants, and UNDERHILL, respondent.

1. An agreement between a creditor and his debtor that the former shall take the business of the latter and be responsible for and pay all the business debts, operates as a release of a debt of such creditor which is shown to be a debt connected with such business.

2. The release of a debtor from all liability for a debt, is also a release and discharge of the mortgage of a third person given as collateral for such debt.

3. A mortgage given for a specific purpose must be applied exclusively to that purpose, and any other disposition of it will be a fraudulent misappropriation, against which the mortgagor will be entitled to relief.

4. A husband has no power, by virtue of the marital relation, to dispose of his wife's separate property. He may become her agent in the management and disposal of it, but the validity of his acts and the extent of his powers will be measured, as in the case of other agents, by the scope of the authority his principal has conferred.

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5. A husband was the agent of his wife in the making and delivery of a mortgage on her estate, which was made to A specifically as security for the debt of B. The debt being extinguished by the release of the principal debtor: *Held*, that the husband, under the authority to deliver the mortgage for the purpose for which it was made, had no authority to re-pledge the mortgage to A as security for the collection of assets which had been transferred by the debtor to A in satisfaction of the debt.

6. The assignee of a mortgage holds it subject to the same equities and defences that existed against it in the hands of the mortgagee.

The opinion of the Chancellor is reported *ante p.* 17.

Mr. E. M. Shreve and *Mr. B. F. Watson* (of New York),
for appellants.

Mr. F. B. Ogden and *Mr. I. W. Scudder*, for respondent.

The opinion of the court was delivered by
DEPUE, J.



The bill in this case was filed to foreclose a mortgage bearing date on the 11th of January, 1868, and made by the defendants, William Atwater and Margaret A., his wife, to one Gaston Lemercier, in the sum of \$8000. The legal title to the mortgaged premises was, at the time of giving the mortgage, and still is, in the wife.

William Atwater, the husband, was engaged in business in the city of New York, prior to November, 1866. Having become embarrassed in his circumstances, on the 13th of November, 1866, he made an assignment of his stock and business to Lemercier for the benefit of his creditors. About the 1st of February, 1867, Lemercier sold and transferred the stock and business to James B. Atwater, who is the brother of William. The business was subsequently carried on by James, under the management of William, who was employed as salesman on a salary. There is evidence from which it may be inferred that the business, though in the name of James, was really carried on for the benefit of William, under an agreement that it was to be transferred

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to him when his circumstances would permit him to resume business in his own name.

After the sale and transfer to James, he became indebted to Lemercier, for money which he borrowed of him at different times, in the sum of about \$10,000. The moneys so borrowed were used in the business; and in July, 1867, the defendants made and executed a mortgage on the same premises to Mrs. Lemercier, in the sum of \$8000 to secure the repayment of the money loaned to James. This mortgage being unsatisfactory to Lemercier, because of the omission of the usual interest clause, the mortgage now in controversy was substituted for it. The business was conducted in the name of James until March, 1868, when financial embarrassments in the concern again arose, and negotiations were concluded between William and Lemercier for the sale of the stock of merchandise to Lemercier. This arrangement did not include the other assets of the business, and the object of the sale was to pay Lemercier the indebtedness of James to him. This bargain was made without the knowledge of James, and without any authority on the part of William. It was communicated to James on the next day, and he refused to ratify it unless the whole business was taken off his hands, and Lemercier would assume all the debts and liabilities on account of it. A new agreement was thereupon made between James and Lemercier, which is in writing, and under seal, and bears date on the 5th of March, 1868. By this agreement James assigned and transferred to Lemercier all the assets of the business, including the merchandise, notes, and open accounts, and Lemercier agreed to assume and be responsible for all the business debts owed by James, whether upon notes or accounts, as shown by the books.

Lemercier, on the 16th of March, 1868, assigned the mortgage to the complainant to secure a note, made for his accommodation by James, for \$4000, which was made on that day but ante-dated the 17th of February, 1868, and was transferred to the complainant.

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The moneys which were lent by Lemercier to James were borrowed by him in his own name, and he became the principal debtor. These moneys were embraced within the agreement of March 5th, 1868. They appear on the books of James, which are referred to in that instrument as descriptive of the debts to be assumed, as debts contracted in connection with the business in the form of credits to Lemercier, from time to time, as the several sums were advanced. The legal effect and operation of the agreement of Lemercier to assume and pay this debt which was due to himself, was to release and extinguish it. That such was the intent of the parties is too firmly established by the testimony to admit of any doubt. Lemercier testifies that James does not owe him anything now ; that he was indebted to him at the time of the sale, but after the sale his personal indebtedness ceased to exist.

The effect of the satisfaction and extinguishment of the indebtedness for which the mortgage was collateral, was to discharge and extinguish the mortgage. In the absence of an agreement by the surety that his liability or that of the securities he pledges shall continue, notwithstanding the discharge of the principal debtor, which in effect makes the surety the principal debtor, an absolute release by the creditor of the principal debtor from all ultimate liability for the debt, will enure to the benefit of the surety and operate. *ex proprio vigore*, as a discharge of his liability. *Lewis v. Jones*, 4 B. & C. 506 ; *Webb v. Hewitt*, 3 K. & J. 438 ; *Green v. Wynn*, *Law Rep.* 4 Ch. App. 204, 206.

The complainant contends that, notwithstanding this release, Lemercier was entitled to retain the mortgage by force of an agreement made pending the negotiations which resulted in the sale. It is proved in the case that after the inventory and valuation of the merchandise were made, the assets were found to be insufficient to pay the liabilities, and that the ability to collect them all was doubtful ; that Lemercier refused to conclude the bargain, but being advised by Johnson, who was a clerk in the establishment,

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that under the circumstances it would be best to accept the transfer, if William would let the mortgage remain as security for the collection of the assets, he finally gave his consent. Johnson testifies that thereupon an agreement was made between William and Lemercier that the sale and transfer should be concluded on the terms demanded by James, and that the mortgage should be retained by Lemercier as security for the collection of the book accounts and notes, which were part of the assets transferred, and liable for any deficiency in the collection thereof; and that after the arrangement was made, the terms proposed by James with respect to his release from all the debts, were accepted, and the agreement of March 5th, 1868, was prepared.

The agreement for the retention of the mortgage in the hands of Lemercier was made by William, without the knowledge of James. It is not contended by the complainant that James assumed any obligation whatever for the collection of the assets. His discharge from all responsibility whatever connected with the business, without any qualification or condition, is conceded. The effect of the transaction was to satisfy the debt of James, whereby the mortgage was discharged, and to place it in the hands of Lemercier upon an entirely different contract. The contract under which Mrs. Atwater consented to pledge the mortgage originally, was one which gave her a remedy over against James, personally, for indemnity. Under the new contract for re-pledging it, she had, as a means of indemnification, only the remedy by subrogation to his right in assets which should be found by Lemercier to be unavailable.

A mortgage which has been satisfied may be given a new vitality by a re-delivery by the mortgagor to the mortgagee or a third person, upon a new consideration, or for a purpose different from that for which it was made. *Robinson v. Urquhart*, 1 *Beas.* 515; *Hoy v. Bramhall*, 4 *C. E. Green* 563. But to give such effect to the mortgage the re-pledging must be made by the authority of the person whose estate is sought to be held for the performance of the

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new obligation. Mrs. Atwater was the owner of the mortgaged premises, and the mortgage, when once extinct, could only be revived by an authority which emanated from her.

The proof is that the mortgage was made specifically for the accommodation of James, as a security for the loans made to him. A mortgage given for a specific purpose must be applied exclusively to that purpose, and any other disposition of it will be a fraudulent mis-appropriation, against which the mortgagor will be entitled to relief. *Andrews v. Torrey*, 1 *McCarter* 355.

Lemercier is chargeable with notice that the title was in her. He knew the purpose for which the mortgage was originally given. There is no testimony from which to impute to Mrs. Atwater fraud, actual or constructive, in relation to the transaction. The case must stand upon the naked ground of the authority of William to act as agent for his wife to bind her by the agreement under which the mortgage, once extinct, was given a new vitality in the hands of Lemercier.

The power of the husband to bind the separate estate of his wife, will not result from the marital relation. The disability of the husband to bind her property is not left to inference from the creation of a separate estate. The statute expressly declares that it shall not be subject to his disposal. He may become the agent of his wife in the management and disposal of her property, (*Knapp v. Smith*, 27 *N. Y.* 277; *Owen v. Cawley*, 36 *Ibid.* 600); but when he does so, the validity of his acts will be determined, and the extent of his powers measured, as in the case of other agents, by the scope of the authority which his principal has conferred. *Lawrence v. Finch*, 2 *C. E. Green* 234.

William was the agent of his wife in the making and original negotiation of the mortgage. The Chancellor concludes that his agency in this transaction was general, and not limited to any particular terms, and on this ground the decision below was made. My examination of the case has led me to a different conclusion. The authority of an agent

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to use his principal's name as security for a third person, will not result from an agency, however general, in the transaction of the principal's business, unless it be shown that the agent was authorized to use the principal's name for such purposes, either expressly, or by implication from proof that he was accustomed, with his principal's consent, to use his credit for the accommodation of others. *Gulick v. Grover*, 4 *Vroom* 463. It is manifest that the negotiations which preceded the making of the mortgage, were for a security for the indebtedness of James to Lemercier. Mrs. Atwater testifies that the mortgage was made specifically for that purpose. In this she is confirmed by her husband, and not contradicted by the testimony of any witness. Indeed, the complainant's counsel, in the brief submitted in this court, admit that the mortgage was executed as security for this indebtedness. When the proposition to resell to Lemercier was communicated to her she was informed that one of the terms of sale was that the mortgage was to be satisfied, and the husband had authority from her to see to its payment and cancellation. This is the extent of the agency of the husband. She testifies she never consented to the re-pledging or use of the mortgage in any way different from its original purpose. In December, 1868, a paper was prepared for her signature by Lindley Underhill, with the knowledge of Lemercier, giving consent to the use of the mortgage as security for the collection of these claims, which she refused to sign. She further testifies that she never gave her husband any general authority to act for her in disposing of or pledging her estate. There is no evidence, direct or circumstantial, to impeach the truth of her testimony.

The agency of the husband in these transactions was special, and did not include the power to re-pledge the mortgage for a purpose foreign to that for which it was made. When he had delivered it to Lemercier for the special purpose for which it was made, his authority was at an end. He could not, after the object of its execution and delivery was fulfilled by the satisfaction of the debt which it was

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executed to secure, re-pledge it for a different purpose without new authority from his wife. His subsequent use of it was a fraudulent misappropriation of the security, against which his wife is entitled to relief. *Andrews v. Torrey*, 1 *McCarter* 355.

The mortgage while in the hands of Lemercier was satisfied and discharged. By the re-pledging without her authority, it did not acquire a new vitality against Mrs. Atwater. It is equally invalid in the hands of the complainant. As assignee he acquired no rights superior to those of Lemercier, his assignor, and holds it subject to the same equities and defences that existed against it in the hands of the mortgagee. *Shannon v. Marselis*, *Saxt.* 413; *Jacques v. Esler*, 3 *Green's Ch.* 461; *Woodruff v. Depue*, 1 *McCarter* 168; *Andrews v. Torrey*, *Ibid.* 355; *Conover v. Van Mater*, 3 *C. E. Green* 482.

The decree appealed from should be reversed, and the complainant's bill dismissed, with costs in this court and in the Court of Chancery.

The whole court concurred.

TAYLOR, appellant, and MORRIS, respondent.

1. As between the parties to an usurious instrument, or as against a subsequent holder with knowledge of the defect, the original taint of usury attaches to all substituted obligations or securities however remote, unless the transaction be purged of the original vice by expunging the usurious element.

2. A new settlement of the accounts between the borrower and lender, and the cancellation of the original security, or the introduction of a new consideration in the shape of an additional loan, will not operate to give validity to any succeeding obligation which secures the usurious exaction.

3. In setting up a defence of usury in a suit in chancery the defendant must, in his answer, as in a plea of usury in an action at law, set out the particular facts and circumstances of the supposed usurious agreement, that the court may see that the agreement was in violation of the statute.

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4. The burden of proof is on a defendant alleging usury, and the defense must be sustained by such preponderance of evidence as establishes the truth of the allegations on which it depends, beyond a reasonable doubt.

On appeal from the decree of the Chancellor, made on the advisory opinion of the Vice-Chancellor, reported *ante* p. 439.

Mr. W. H. Vredenburg and *Mr. B. Williamson*, for appellant.

Mr. J. J. Ely and *Mr. J. Wilson*, for respondent.

The opinion of the court was delivered by
DEPUE, J.

The bill in this case is filed for the foreclosure of two mortgages, made by the appellant to the respondent, bearing date respectively on the 26th of August, 1867, and the 12th of April, 1869, each in the sum of \$2000. The defence is usury in each of the mortgages.

The allegation of the defendant is that the first mortgage was given to secure money loaned at the time the mortgage was made, and that only \$1746.10 was paid to him, the balance being retained by the complainant as a bonus, in pursuance of a contract to that end between the parties. Two checks are produced, made by the complainant to the defendant, each bearing date contemporaneous with the mortgage, the one for \$1000, payable on demand, the other for \$746.50, payable on the first day of October following. The defendant testifies that he received no other consideration for this mortgage than these two checks. The complainant testifies that at the making of the mortgage the sum of \$250, or thereabouts, was due to him from the defendant for money loaned out of pocket, in several sums, within a month prior to the mortgage; that the amount was figured up and included in the mortgage; and that the mortgage was given for the precise sum due, nothing being retained by way of a bonus.

With respect to the second mortgage, the defendant's

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allegation is that he was indebted to the complainant in the amount of two notes, the one dated February 24th, 1869, for \$500, the other dated March 29th, 1869, for \$600; and that the said mortgage was given for those two notes and the sum of \$600, advanced when the mortgage was made, the balance being retained as a bonus for the loan. He further alleges that the complainant had illegally retained upon the loans for which the said notes were given, ten per cent. over and above the lawful interest. The complainant testifies that, besides the sums above mentioned, another note he held against the defendant, for \$150, bearing date on the 25th of January, 1869, was included in the mortgage, and that the difference was made up of moneys due him on other transactions, which were adjusted at the time. Of these latter transactions the complainant does not profess to be able to give any accurate account. He declines to swear positively as to dollars and cents, but testifies directly that the mortgage does not represent any more than the defendant owed him according to their settlement. He is confirmed in the statement that the \$150 note was included in the mortgage by the receipt which was given by him to the defendant at the time the mortgage was given, whereby he acknowledged payment of three notes, among which the note for \$150 is named; and several checks were produced, made by the complainant to the defendant, bearing date at different times between the dates of the two mortgages, amounting in all to a considerable sum. Furthermore, the defendant testifies that he and the complainant had money transactions during the year previous to the making of the second mortgage; that the complainant, during that period, loaned him money at different times; and that he cannot tell minutely as to all the money transactions between him and the complainant during that year, either as to sums borrowed or notes given, although he says all such loans had been paid prior to the making of the mortgage, except the two notes mentioned.

On his examination before the master, the defendant testi-

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fied that when the two notes for \$500 and \$600, which were included in the mortgage, were given, there was retained by the complainant on each a bonus above legal interest for the accommodation. In his principal examination he fixes the amount so retained at ten per cent., but in his cross-examination he displays uncertainty in his recollection as to precise sums.

The Vice-Chancellor, on the authority of *The State Bank of Elizabeth v. Ayers*, 2 Halst. 130, held that the giving of a new security upon a settlement and agreement between the parties, in renewal or discharge of a prior security which was usurious, will extinguish the taint. This is the first time this question has arisen in this court.

The defendant testifies that the bonus for the loans was retained by the complainant when the notes were made, and that the stipulated compensation for the accommodation was included in the notes. When the mortgage was given, no abatement was made for the sums so retained. The original transaction was not purged of its illegality by excluding whatever was usurious in the notes when they were made. The mortgage is a security for those very sums, as well as the moneys actually lent.

It is well settled that the mere substitution of one security for another security which is usurious, will not remove the original taint. An exception to this rule exists in favor of a bona fide holder of an usurious security who receives from the maker a new security without any knowledge of the usury. In his hands the new security may be enforced. *Cuthbert v. Haley*, 8 T. R. 390; *Chapman v. Black*, 2 B. & Ald. 588; *Kent v. Walton*, 7 Wend. 256; *Bank of Monroc v. Strong*, Clarke's Ch. (N. Y.) 76; *Aldrich v. Reynolds*, 1 Barb. Ch. 43.

If the immediate parties to the transaction repent, and by mutual consent the usurious security be surrendered, a new promise to pay the sum loaned with legal interest may then be enforced, on the principle that the parties have purged the transaction of its original vice. *Barnes v.*

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Hedley, 2 *Taunt.* 184; *Corwyn on Usury* 183; *De Wolf v. Johnson*, 10 *Wheat.* 367; *Miller v. Hull*, 4 *Denio* 104.

But as between the parties to the usurious instrument, or as against a subsequent holder with knowledge of the defect, the original taint attaches to all substituted obligations or securities, however remote, unless the original vice be removed by expunging the usurious element. *Wickes v. Gogerly*, 1 *C. & P.* 396; 3 *Saund. Pl. & Ev.* 1189; *Walker v. Bank of Washington*, 3 *Howard* 62; *Tuthill v. Davis*, 20 *Johns. R.* 285; *Powell v. Waters*, 8 *Cow.* 669; *Vickery v. Dickson*, 35 *Barb.* 96; *Fulton Bank v. Benedict*, 1 *Hall's Superior C. R.* 481–544. No recovery can be had upon any succeeding obligation which operates to secure the usurious exaction. A new settlement of the accounts between the borrower and lender, and the cancellation of the original security, or the introduction of a new consideration in the shape of an additional loan, will not operate to give such an instrument validity. *Preston v. Jackson*, 2 *Starkie* 211; *Harrison v. Hannel*, 5 *Taunt.* 780; *Jackson v. Packard*, 6 *Wend.* 415; *Hammond v. Hopping*, 13 *Wend.* 505; *Dunning v. Merrill*, *Clarke's Ch.* 252; *McCraney v. Alden*, 46 *Barb.* 272.

If the pleadings in this case were sufficient to present a defence of usury on the ground that the notes which were part of the consideration of the mortgage and are secured by it were made upon an usurious agreement, such defence might be made, although the mortgage was made upon an accounting and adjustment of those with other moneyed transactions—the usury not being purged. The cases last cited are directly in point, and are founded on correct principle. In each of these cases a former security tainted with usury was surrendered, and a new security taken, into which entered other valid and legal considerations; and the new security was held to be avoided by the usurious taint which, not being remitted, was carried into it.

But the answer is not so framed as to enable the defendant to avail himself of this part of the defence.

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The charge in the answer in relation to these notes is introduced in the narration of the circumstances of the making of the mortgage, in the following words: "That at or about the time of the execution of said last mortgage, the said complainant offered to this defendant, that if this defendant and his wife would execute to complainant a mortgage to secure the payment of \$2000, with interest from its date, that he, the complainant, would give up and surrender to this defendant two notes of hand for the payment of \$1100 (then held by complainant against this defendant, and on which complainant had already reserved and taken from this defendant ten per cent. higher rate of interest than was then or is now allowed by the law of the place where the said notes were made or to be paid); and would also give to this defendant the sum of \$600 besides and in addition to surrendering said notes; that thereupon this defendant consented and agreed to this last above named offer of complainant, and did thereupon execute and deliver to complainant the said last named mortgage, together with a bond; that, upon the execution and delivery of said last named mortgage by this defendant and wife to complainant, the complainant gave to this defendant the sum of \$600, and also surrendered up to this defendant the said notes of hand for \$1100."

With the exception of the allegation that the amount actually lent, for which the mortgage was given, was only \$1590, there is no other averment from which an inference may be drawn, that usury in the inception of these notes would be relied on. The charge is that the said bonds and mortgages were usurious, and that on them, and each of them, a higher rate of interest was reserved and taken than was allowed by law. When usury is set up by a plea in an action at law, or in an answer in chancery, the terms of the usurious contract must be precisely and correctly set out; the quantum of the usurious interest must be specified, and the proof must correspond with the allegations. *Corwyn on Usury* 203; *Vroom v. Ditmas*, 4 *Paige* 526; *Cloyes v. Thayer*, 3 *Hill* 565; *Rowe v. Phillips*, 2 *Sandf. Ch.* 14;

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Griggs v. Howe, 31 *Barb.* 100; *Clarke v. Hastings*, 9 *Gray* 64. In setting up a defence of usury in a suit in chancery, the defendant must, in his answer, as in a plea of usury in an action at law, set out the particular facts and circumstances of the supposed usurious agreement, that the court may see that the agreement was in violation of the statute. *New Orleans G. L. & B. Co. v. Dudley*, 8 *Paige* 452; *Curtis v. Masten*, 11 *Paige* 15; *N. J. Pat. Tanning Co. v. Turner*, 1 *McCarter* 326. The answer in this case, so far as regards the defence founded on the usury in the notes, is obviously deficient in this respect. No particulars whatever of the illegal contracts under which the notes were made, either as to the terms, or times when, or place where made, are averred. The only contract which is set out in the answer with any particularity, is that which was made immediately in connection with the mortgage, and upon this the defence must rest.

I agree with the Vice-Chancellor that the testimony is insufficient to maintain this defence, which is sufficiently pleaded in the answer.

The only witnesses who testify to the circumstances of the making of the mortgages, and the consideration upon which they were made, are the parties themselves.

The burden of the proof is on the defendant, and the defence cannot be supported by probabilities or suspicions, however strong. If allowed to prevail, it must be sustained by such preponderance of evidence as establishes the truth of the allegations on which it depends, beyond a reasonable doubt. *Brolasky v. Miller*, 4 *Halst. Ch.* 789; *N. J. Pat. Tanning Co. v. Turner*, 1 *McCarter* 326; *Conover v. Van Mater*, 3 *C. E. Green* 481.

This rule as to the degree of proof required, in a measure depends upon the character of the defence. The usury law now in force has mitigated the penalty which was prescribed by the former law, but has not abolished it. The plaintiff, on a successful defence, loses the interest on the sum lent and the costs of the suit, both of which he would be entitled

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to recover on a demand not obnoxious to the provisions of the statute. To this extent the defence involves a forfeiture as a penalty, and the rules of evidence touching the enforcement of a penalty still apply. (*Conover v. Van Mater.*) In addition thereto the defendant, in the securities he executed, has put in writing an acknowledgment that he received the full amount of the securities in question. In the most ordinary case, where the parties have put their contract in writing, public policy and established rules of evidence exact clear and cogent proof when parol testimony is relied on to show a different contract. The statute which makes parties competent witnesses in their own behalf, provides facilities for defences of this kind. If the defence should ever be sustained upon the uncorroborated testimony of the party by whom the security was made, the testimony should be, in all respects, unexceptionable.

It is not proposed to comment on the evidence in detail. The prominent points in the testimony have been fairly stated by the Vice-Chancellor in his advisory opinion. The dealings between the parties, which were quite considerable, were loosely conducted. The defendant is not corroborated by any other evidence in the cause, and in some important respects the accuracy of his statements is discredited by collateral proof. He is flatly contradicted with respect to the material facts of the case by the complainant, and there are no circumstances which should incline the court to give greater credit to him, as a witness, than to the complainant.

The decree appealed from is affirmed, with costs.

For affirmance—BEASLEY, C. J., DEPUE, LATHROP, OGDEN, OLDEN, SCUDDER, WALES, WOODHULL. 8.

For reversal—DALRIMPLE, VAN SYCKEL. 2.

Crane v. Decamp.

CRANE, appellant, and DECAMP and others, respondents.

1. When a final decree involves the merits of the case settled by the interlocutory decree, an appeal from the final decree brings the whole case before the court.

2. If a person having charge of the property of another so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion, and must separate his own property, or lose it, if the obligation of keeping an account rests upon him.

Mr. Kirkpatrick and *Mr. T. Runyon*, for appellant.

Mr. Linn and *Mr. C. Parker*, for respondents.

The opinion of the court was delivered by
VAN SYCKEL, J.

By the decree of this court made in June Term, 1869, it was ordered that the record in this cause be remitted to the Court of Chancery, that an account might be taken of all the rents paid for the leased premises in controversy in this suit, and the interest thereon, from which should be deducted taxes paid and the interest thereon; and that the balance of rent, after the payment of taxes, should be apportioned in proportion to the value to the tenant under the lease of the respective lands late of Augusta Decamp, and of Eliza A. Crane, including her wood lot, subject to certain charges in said decree mentioned.

In pursuance of an order made by the Chancellor, reference was made to a master, who made his report that the sum of \$14,553.12 was due from said Eliza to said Edward Decamp, with interest thereon from July 1st, 1870.

On the 19th of April, 1871, the master's report was confirmed, and no appeal having been taken from this interlocutory order within the time limited by law, a decree final was made by the Chancellor on the 16th of June, 1871, which Eliza A. Crane has removed by appeal into this court.

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The respondents insist that the amount reported by the master is correct, and that if it is not, its accuracy cannot now be controverted, because no appeal was taken from the interlocutory decree within the forty days given by the statute for that purpose.

When a final decree, as in this case, involves the merits of the case settled by the interlocutory decree, an appeal from the final decree brings the whole case before the court. *Terhune v. Colton*, 1 *Beas.* 312.

The Crane lot containing eight acres of land, and the Decamp lot ten acres, adjoining each other, were leased and worked together as an iron mine, under a rental of thirty-seven and a half cents per ton for all the ore taken out. The contention on this appeal is as to the amount of ore taken from each lot.

The period covered by the master's report is from June, 1854, when the lessee commenced mining, until April 1, 1870. It is admitted that the whole amount of ore taken from both lots is 117,167 tons, for which the royalty or rental of thirty-seven and a half cents per ton has been received by Eliza A. Crane, but no account has been kept for the whole time by which these returns can be accurately divided between the parties. No accounts were kept between the two lots up to April 1st, 1864, at which date 46,995 tons had been taken from the leased premises. Exhibits E and F show that of the ores taken between April, 1864, and April, 1870, (except 18,000 tons,) about 2000 tons more were mined from the Crane than from the Decamp lot. This 18,000 tons was raised from shaft No. 2, from which both lots were worked, no account of the quantity taken from the respective lots through this shaft having been kept.

One of the witnesses examined for the respondents testifies that in his opinion about 15,000 tons more have been taken from the Decamp than from the Crane lot, while another estimates the excess from the Decamp lot to be 37,756 tons. The latter witness bases the accuracy of his estimate upon a map made by Briersworth, which was not shown to be correct,

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except in so far as it was partly verified by measurements taken by the witness. Even if this map is assumed to be substantially accurate, the estimate is not reliable, because the width of the vein, which varies from two to twelve feet, does not enter into the computation. On the part of the appellant, witnesses, who seem to have had at least equal means of knowledge, assert decidedly that the greater quantity of ore has been procured from the Crane lot. In this state of uncertainty, it is material to consider the relation that the parties occupy to each other.

If a person having charge of the property of another so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion, and must separate his own property, or lose it, if the obligation of keeping an account rests upon him. *Lupton v. White*, 15 *Vesey* 432; *Hart v. Ten Eyck*, 2 *Johns. Ch.* 62.

If, therefore, the duty had fallen upon Mrs. Crane of keeping an account of the product of each mine, all uncertainty would be solved against her, and the decree could not be disturbed. But in this case Decamp, in the preparation of the lease, omitted to provide for rendering such account, neither he nor Mrs. Crane contemplating that it would in any contingency become necessary to have it. Neither party, therefore, occupies a superior position, by reason of the uncertainty which rests upon this question. There are 64,993 tons of ore which cannot be apportioned under the testimony with any certainty. In the absence of any other controlling circumstance, it would be just to divide it in proportion to the number of acres in each lot; but the fact that Mrs. Crane's wood lot furnished the wood for the entire mine, that the pump shaft on her lot drained both properties, and that of the certainties her lot gave in excess of the other about 2000 tons, must weigh against the advantage which the Decamp lot has in number of acres. No allowance was made by the master to Mrs. Crane for the pump shaft, nor did his account include the value to the lessee of her

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wood lot, as was directed by the decree of this court on the former appeal.

In this view of the case, I think that the most equitable result that can be reached will be to divide the products of the mine for the entire period of working up to April, 1870, equally between the two lots.

The master's report shows that the net proceeds of the ore in Mrs. Crane's hands on the 1st day of July, 1870, after deducting taxes, is the sum of \$56,978.83, one-half of which, or the sum of \$28,489.41, should be credited to Decamp. This latter sum is to be charged (as per the master's report) with the sum of \$19,488.19, due from Decamp to Mrs. Crane, leaving in her hands, due to the Decamp lot, on the 1st day of July, 1870, the sum of \$9001.22, which should be a lien on her eight acre lot until it is paid.

In my opinion the decree of the Chancellor should be reversed, each party to pay their own costs in this court and in the court below, and the record remitted to the Court of Chancery that a decree may be had in accordance with the views herein expressed.

The whole court concurred.

ADDITIONAL RULES

OF

THE COURT OF CHANCERY.

[Adopted May 8, 1869.]

XXXII....OF JOINDER OF COMPLAINANTS.

152. Any number of persons, severally owning or possessing distinct tenements injuriously affected by a common nuisance or other common grievance, may join in a bill for injunction or relief; provided, that it shall be in the discretion of the Chancellor to strike out of the bill any of such complainants, when, in his opinion, the justice of the case, or convenience of proceeding, shall require it.

[Adopted April 1, 1870.]

XXXIII....OF APPLICATIONS FOR MONEYS IN COURT FOR THE PAYMENT OF DEBTS OF DECEDENTS.

153. Applications by executors or administrators for the surplus moneys on foreclosure sales, or for the proceeds of lands sold in suits for partition, to be applied by them to the payment of the debts of a decedent represented by them, shall be made by petition. The petition shall state the time of the death of the decedent, the date of the sheriff's or master's deed upon which such moneys were received, whether any of the heirs or devisees have aliened or encumbered their estate in the lands sold, in whole or in part, and when and what part, and to whom. There shall be annexed to the petition a true account of the personal estate of the

decedent that has come to the hands or knowledge of the petitioner, stating the amount of the same which has been collected or realized, and what part, if any, has not been collected or realized, and specifying what parts are deemed good, doubtful, or desperate. Such account shall also state how the amount realized has been disposed of and how much remains on hand; also, the debts due, or claimed to be due, from the decedent, and to whom owing, and what part of such debts are disputed by the petitioner. And such petition and account shall be verified by oath.

154. Such petition shall be filed, and notice of the application shall be given for ten days before the same is made, to all persons entitled to such moneys, or any part thereof, if not required for the payment of debts. Such notice—beside the time and place of application—shall state the amount of the personal estate that has come to the hands of the petitioner, the amount paid out for debts and expenses, and the amount of debts paid and claimed to be due and unpaid. Such notice may be served upon persons who reside out of the state and have not appeared in the suit, by setting up a copy in the office of the clerk of this court, and also mailing a copy to the post-office address of such person, if the same be known.

155. Unless the consent of all so interested in such moneys shall be given to the payment of the same, or a sufficient part thereof, to the petitioner, it shall be referred to a master to ascertain and report upon the truth of the matters in such petition and account; and also, how much will be required for the payment of the debts of the decedent above the amount realized and likely to be realized from the personal estate: and also, whether any part of the lands sold has been aliened by the heirs or devisees before the sale, so as by law to be free from the lien for the debts of the decedent, and what part, and when, and to whom aliened. And the summons to attend such hearing before the master shall not be required to be served on any person, except such as may have entered an appearance on the notice of the application.

156. No order shall be made for the payment of such moneys unless it shall appear that such executor or administrator shall have administered, as nearly as practicable, all the moneys received by him, and used due diligence to collect such as have not come to his hands.

157. No moneys shall be paid on such application until the petitioner shall have filed in this court his bond to the Ordinary, in double the sum directed to be paid, with two sufficient sureties, residents of this state, with condition similar to that prescribed by law for bonds upon orders of the Orphans Courts for the sale of lands for the payment of debts.

XXXIV....OF SUITS FOR DIVORCE.

158. In suits for divorce on account of adultery, the bill or petition shall state the name of the person with whom the adultery was committed, if known; and if not known, shall set forth the description of the person, or such designation of the time, place, and circumstances under which the act or series of acts were committed, as will enable the defendant and the court to distinguish and individuate the particular offence or offences intended to be charged. And no reference shall be ordered in a suit in which the offence is not so designated. And if the name of the person is stated to be unknown, it must be shown on the reference that it was not known at the commencement of the suit.

159. On a reference in a suit for divorce, the master shall take down and report the testimony in such manner that it may appear whether the facts sworn to are within the personal knowledge of the witness, or are from hearsay or reputation; and the master shall not report any evidence from hearsay or reputation which shall appear to him to be illegal, unless the complainant or his counsel insists that the same is legal. And such master shall report distinctly what facts alleged as the ground for divorce are proved to his satisfaction; and, also, what facts necessary to give jurisdiction are so proved. And in suits based on desertion, he shall examine into and report the facts and circumstances under which the

desertion took place, and the reasons which caused or provoked it, if the same can be ascertained.

XXXV....OF SUITS IN WHICH THE CHANCELLOR MAY BE
INTERESTED.

160. In any suit commenced in which the Chancellor may be a party, or may be interested, an order shall be made requesting the Vice-Chancellor, or the Chief Justice, or such Associate Justice of the Supreme Court or Master in Chancery as the Chief Justice may designate for that purpose, to hear the same and all proceedings therein, and to advise the Chancellor what orders and decrees to make therein. And in the process, pleadings, orders, and other proceedings in suits to which he may be a party, the Chancellor, when referred to as such, shall be designated by his name of office only.

XXXVI....OF FEES OF MASTERS.

161. On all reports made by masters upon special reference in the case herein specified, the master shall be entitled to four dollars for making the report, and thirty cents per folio for drawing the same and all schedules annexed thereto.

1. On the divisibility of lands in suits for partition.
2. On the merits, in application for the sale of lands of infants, idiots, or lunatics.
3. On references in foreclosure suits, when any defendant holding an encumbrance has appeared and is summoned.
4. On reference to ascertain the amount to be paid or invested in lieu of dower, or curtesy, or life estate.
5. On application for surplus moneys in foreclosure suits.
6. On application for the proceeds of sales in partition for the payment of debts.
7. On references on the merits in divorce suits.
8. On all references to take and state accounts.

XXXVII....OF NOTICES ON APPLICATION TO BE MADE PARTY.

162. If the party shall be dead on whom the petition or notice of application is required to be served, by the fourth

section of "An act relating to the Court of Chancery," approved March 17th, 1870, such notice or petition may be served either on the executor or administrator of such deceased party, or on the solicitor who appeared for him in his lifetime; or, in case there be no such executor, administrator, or solicitor, it may be served by putting up the same in the office of the clerk of this court, and such service shall be lawful service.

[Adopted October 18, 1870.]

XXXVIII...OF PRINTING EVIDENCE.

163. In all cases the evidence in any cause to be used on the hearing shall be printed, unless the same shall be less than thirty folios; and the printing shall be paid for as directed in the one hundred and forty-seventh rule of this court. And in cases where part of the evidence consists of exhibits, only those parts of the exhibits shall be printed upon which some question exists, or shall be made by the parties in the cause.

XXXIX....OF AFFIDAVITS TO ANSWERS BY DEFENDANTS OUT OF THE STATE.

164. Where an answer shall be sworn to by a defendant out of this state, the oath may be taken before a notary public, certified under his seal, or before any person who shall be authorized by the law of this state to take the acknowledgment of the execution of a deed for lands in this state at the place where such answer shall be sworn to. And the authority to such person shall be certified in the same manner as required for the recording of a deed acknowledged before him.

XL....OF INTEREST ON MONEYS IN COURT.

165. All sums exceeding two hundred dollars, which shall be deposited and remain in court for ten days, and all sums not exceeding two hundred dollars which shall be deposited

and remain in court for thirty days, shall be allowed interest at the rate paid by the depositary of the funds of the court at the time, for the full period for which such funds shall remain in court.

[Adopted June 19, 1871.]

XLI....OF SURPLUS MONEYS IN FORECLOSURE SUITS.

166. Petitions for surplus moneys in foreclosure sales may be presented at any time after the sale, and before the moneys are paid into court. And if any order be made for the payment of such surplus before the delivery of the deed, the sheriff or other officer making the sale shall accept the receipt or order of the person to whom such surplus, or any part of it, may be ordered to be paid, as payment to that extent of the purchase money, or may pay the same to such person.

167. Any master, to whom an application for surplus moneys may be referred, shall issue summonses to all defendants, whose claims are not directed in the execution, to be paid out of the proceeds of sale. And he shall not proceed, unless such summonses shall have been served five days, as directed in the 86th rule, or the parties shall appear before him.

168. Where the bill in a foreclosure suit shall be ordered to be taken as confessed against any defendant, no report or decree shall be made by which his rights or claims are postponed to those of any other defendant, unless the priority of the rights or claims of such other defendant, and the facts upon which it depends, are distinctly set forth in the bill. And any controversies between such defendants may be settled upon application for the surplus moneys.

XLII....RELATING TO THE VICE-CHANCELLOR.

169. The Vice-Chancellor shall be an Injunction Master, and injunctions shall issue upon filing his determination advising the same.

170. Any cause or other matter may be referred to the Vice-Chancellor, at the discretion of the Chancellor. Application for such reference, if not made by both parties, may be in presence of, or upon five days' notice to the adverse party, or his solicitor.

171. When a cause shall be referred to the Vice-Chancellor, all proceedings in it to the final decree shall be had before him.

172. When a cause referred to the Vice-Chancellor shall be at issue, the complainant shall set it down for hearing in the equity district where the same is to be tried, at the next term which may be held therein thirty days after issue is joined and the cause referred, and shall give notice of such hearing to the adverse party, within ten days after issue is joined and the cause referred, and such notice shall be served at least fifteen days before the term for which it is given.

173. A cause may be set down for hearing at the election of the complainant, either in the district in which the complainant or any defendant with whom issue is joined resides, or, if the controversy be about real estate, in the district in which the same or the greater part of it is situate. But the district in which the same is to be heard may be changed by the Vice-Chancellor, on application to him, for any reason that may seem to him sufficient.

174. Any other time and place for the hearing may be designated by the Vice-Chancellor, by consent of parties, by an order before such time for which notice is given, or at that time; or may be designated at or before that time by him, on application of either party; if before, on five days' notice.

175. At the time noticed or designated for hearing, both parties shall attend with their witnesses and other evidence, and the cause shall proceed as at a trial at law before a jury, by the oral examination of the witnesses on both sides continuously, until all the evidence has been produced and closed; the party holding the affirmative first producing all his evidence, and after resting, he shall be permitted to produce evidence in rebuttal only; but the Vice-Chancellor

may, in his discretion, reserve to either party the right to produce one or more witnesses, who shall be named, to be examined, orally or by deposition, at a future day. But such right shall not be granted unless the Vice-Chancellor be satisfied that due diligence has been used to procure the attendance or deposition of such witness before the trial, nor unless it be fairly disclosed what is expected to be proved by such witness, and such evidence shall appear to be material, and shall not be admitted by the other party or parties.

176. Either party, after a cause is at issue, may, upon filing an affidavit that a material witness is very old, infirm, or about to leave the state, and that he is in danger by reason thereof of losing the benefit of his testimony, take the deposition of such witness before any examiner, upon like notice and in like manner as such evidence has heretofore been taken; and such deposition shall be filed with the Clerk in Chancery, by the examiner before whom it was taken within six days after it is concluded, and may be read as evidence, subject to all exceptions, at the hearing of the cause, unless some party to the cause shall produce such witness at the hearing, in which case he shall be examined orally.

177. When a stenographer, appointed by the Vice-Chancellor, shall attend to take down the testimony, the examination shall proceed as rapidly as counsel can ask, and the witness answer, the questions. The examining counsel shall not take notes, nor shall the examination be delayed in order that any counsel or other person, except the reporter, may take minutes of the testimony. But every effort shall be made by the court and counsel to expedite the cause, so far as may be consistent with a full and fair hearing thereof.

178. The competency of evidence shall be determined by the Vice-Chancellor, who, upon the objection of either party, or of his own motion, shall exclude evidence that may be illegal or irrelevant.

179. At the time designated for the hearing of a cause,

the hearing shall not be put off (except by consent), for the absence of a material witness, unless the Vice-Chancellor shall be satisfied that a fair and earnest effort has been made in proper time to procure the attendance of such witness, and if such attendance could not be procured, to procure his deposition; and the Vice-Chancellor may, in his discretion, order the hearing to proceed, and direct that any material witness named may be examined orally, or his deposition procured at a future day fixed and named in such order; but the matter to be proved by such witness shall be disclosed at the making of such order, and no hearing shall be postponed for any cause, unless a future time and place for hearing be fixed and designated, and such terms as to costs as may be directed by the Vice-Chancellor be complied with. The argument of a cause or matter may be had, at the discretion of the Vice-Chancellor, either immediately upon the closing of the testimony, or at a future day to be fixed.

180. A rehearing of decrees signed upon the advice of the Vice-Chancellor may be had in the same manner and upon the same terms as in cases heard by the Chancellor. But no rehearing shall be ordered as to conclusions of fact, unless the Vice-Chancellor shall certify that, in his opinion, the questions involved, or some of them, should be again heard upon the evidence.

181. Every Monday shall be motion day at the Chambers of the Chancellor, and every Tuesday at the State House at Trenton, both in term and vacation, except from the second Monday in July to the second Monday in September, when every alternate Monday, commencing with the fourth Monday in July, shall be motion day at the Chancellor's Chambers. All motions on said days may be heard by the Chancellor or the Vice-Chancellor, one of whom will attend for that purpose.

182. All motions in causes not referred to the Vice-Chancellor shall be made on such motion days, and notice of a motion at any other time shall be of no avail, unless specially directed by the Chancellor, and unless the fact of such special direction having been made be expressed in the notice.

183. There shall be four Equity Districts in the state, embracing respectively as follows :

First District, the counties of Cape May, Salem, Cumberland, Gloucester, Camden, Atlantic and Ocean.

Second District, the counties of Burlington, Monmouth, Mercer, Hunterdon, and Somerset.

Third District, the counties of Middlesex, Union, Essex, Hudson, Bergen and Passaic.

Fourth District, the counties of Morris, Warren and Sussex.

184. The terms and places for the sitting of the Vice-Chancellor to hear causes and matters referred to him in said Districts, shall be as follows :

In the *First District*, at Camden, on the first Tuesday of January, the fourth Tuesday of April, and the fourth Tuesday of September.

In the *Second District*, at Trenton, on the Third Tuesday of May, the third Tuesday of September, and the fourth Tuesday of December.

In the *Third District*, at Newark, on the third Tuesday of February, the fourth Tuesday of May, and the second Tuesday of October.

In the *Fourth District*, at Morristown, on the second Tuesday of January, the third Tuesday of April, and the second Tuesday of September.

[Adopted December 23, 1871.]

185. All references to ascertain the value of dower or curtesy in moneys in court, and all references as to surplus moneys on foreclosure sales, and on application for the proceeds of sales in partition suits for payment of debts, shall be to special masters.

186. The 24th, 25th, 26th and 27th rules shall apply to suits for divorce commenced by petition, and to all other suits commenced by petition. And the term complainant in the rules of this court, shall be held to include the petitioner in suits or proceedings commenced by petition.

187. When a defendant shall be arrested on a writ of *ne exeat*, the sheriff may, in lieu of the bond heretofore used and required, take a bond in the sum endorsed on the writ, with sureties, as required by law, with condition that the defendant shall cause his appearance to be entered in the suit, and continue such appearance during its pendency, by a solicitor of this court, residing in the state; and shall at all times render himself amenable to the orders and process of this court pending the suit, and to such process as shall be issued to compel the performance of the final decree therein, and will, for such purposes, appear before this court, or any officer thereof, when so required by the order of this court.

188. The 87th rule is amended by striking out the words "where there are no defendants claiming to be encumbrancers."

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1 In this state, when the executor dies before the testator, a residuary legatee is entitled to administration in preference to legatees, next of kin and creditors. And it is not discretionary with the Ordinary or Surrogates to grant it to any other person than the residuary legatee, when he is willing and able to accept. *In re Kirkpatrick's Will*, 463.

2 Where the residuary legatee is a corporation aggregate, administration with the will annexed will be granted to one of their own number, named by them for that purpose. *Id*

3. Legatees, or their nominee, have no right to administration in preference to next of kin. The residuary legatee has such right. And where there are next of kin, administration cannot be granted to a person of the legatee's selection, until the next of kin have been cited, consented, or received notice. *Id*

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An administrator is not a trustee of the real estate of his intestate for the heir, and as against the heir he may purchase for himself the real estate of the intestate at a judicial sale on foreclosure of a mortgage. He is not entitled to receive the surplus of the proceeds of the sale for the heir-at-law, it must be paid directly to the heir. *Johns v. Norris*, 102.

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If a person having charge of the property of another so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion, and must separate his own property, or

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1. A contract to give in part payment for the purchase of lands, two mortgages, without stating when they were to be paid, whether with or without interest, or at what rate of interest, is the same, practically, as a contract to pay a certain sum on *terms or credits* to be arranged between the parties, and will not be enforced for uncertainty. *Nichols v. Williams*, 63
2. Specific performance will not be decreed of any contract, when any material part of the terms or conditions are uncertain. *Ib.*
3. The defendants contracted with the complainants to construct an ice machine. It was to be finished, and to be put up in working order ready for trial in six weeks; the payments to be \$300 a week for the first and second weeks, and \$400 a week thereafter, until finished, provided the work was satisfactory to the complainants, and the balance at a time specified. The machine was not ready for trial on the day named. The complainants then extended the time twelve days. At that time a trial was had, but the machine proved defective in essential particulars. While the machine was in this situation the Paterson Company, having become insolvent, assigned all its property to Hayes for the payment of its debts under the provisions of the Assignment Act. Hayes did not cause the machine to be completed, but issued an attachment for the balance remaining unpaid. The machine was attached and ordered to be sold. The extension of time made no provision for payment during that time.

The defendants contend that they are entitled to \$400 a week for such extended time. The contract further provided that if the machine was not ready for trial in six weeks, a penalty of \$50 for each day's default, as liquidated damages, should be deducted from the price.

Held, that the claim for penalties during the twelve days' extension could not be sustained; the extension of the time waived the penalties during the extension. That if it is assumed that the weekly payments applied to the extended time, it must also be assumed that the condition that the work should be satisfactory was extended to these payments. That the defendants having neglected to complete and deliver the machine, the complainants had a right to regard the contract as rescinded, and to demand back the money paid. They are consequently creditors of the defendants entitled to proceed against them under the act to prevent frauds by incorporated companies. That the defendants being insolvent at the time of the assignment to Hayes, that assignment is void, though made for the benefit of creditors. All proceedings in the attachment suit restrained, and the creditors and assignee of the Paterson Company restrained from proceeding with its business and disposing of its effects. Receiver to be appointed. *Ice Machine Co. v. Steam Fire Engine Co.*, 72

4. When a party, under a contract for the conveyance of lands to which the grantor has not the whole title, with a knowledge of this fact, agrees to go into possession until the title can be procured to the whole; and the grantor, being unable to procure the whole title, offers to convey all that he has been able to obtain, and such party refuses to accept the conveyance, and retains possession of the property; upon bill filed by such grantor, to compel the purchase and payment for the lands agreed for, demurrer will not lie to the whole bill. It will be retained for the purpose of putting the defend-

ant to his election, either to accept the title, or to abandon the contract and restore the possession. *Davison v. Perrine*, 87

5. An agreement with a defendant in execution to purchase the property for him at the sheriff's sale will not create a trust in his favor unless in writing, or fraudulently used to obtain the property at an inadequate price. *Johns v. Norris*, 102
6. Courts of equity will decree the performance of contracts relating to lands without their jurisdiction. But in such cases, the decree cannot affect the land, but can only be enforced when the court has jurisdiction of the person of the defendant, and thus compel him to execute the conveyance. In such case it is the conveyance, not the decree, that has effect. *Davis v. Headley*, 115
7. An agreement by a mortgagee to go into partnership with the mortgagor, and to cancel a mortgage held on the premises where the business is to be carried on, as the mortgagee's share of the capital, if abandoned before the next payment of interest becomes due, does not amount to an agreement to extend the time of payment of the interest so as to save a forfeiture of credit, incurred by the non-payment of interest. *Fausel v. Schabel*, 126
8. The defence of incapacity to contract—*held*, in this case, to be unsupported by the proofs. *Shields v. Lozeau*, 447
9. An agreement by a purchaser at a sheriff's sale to purchase lands for the defendant in execution, and to hold the title obtained under the sheriff's deed for the benefit of such defendant, is an agreement within the statute of frauds, and, if merely by parol, will not be specifically enforced, except on the ground of fraud and oppression on the part of such purchaser, by means of which he has obtained the property of the debtor at an inadequate price, under the assurance of a con-

tract to reconvey to him, or to hold the same subject to future redemption. *Walker v. Hill's Ex'rs*, 513

10. A secret arrangement between a defendant in execution and a third person for the purchasing in by the latter of the property of the former at a judicial sale, upon a trust for the benefit of the defendant, the object of which is the present disposition of the debtor's property to avoid its subjection to execution and sale at the instance of other creditors, by means of which the property is bought in at inadequate prices, is contrary to the policy of the statute concerning fraudulent conveyances; and a court of equity will not grant relief upon such an agreement by compelling the purchaser to convey to the defendant in execution. *Ib.*

11. M. M. W. brought an action at law against J. T. W. The parties submitted the matters in difference in that suit to arbitration. Their agreement of submission contained the following stipulations: "In case the said arbitrators award that the said J. T. W. pay any amount to the said M. M. W., the said J. T. W. agrees to make and execute his bond to the said M. M. W. in the penal sum of double the amount so awarded to be paid to the said M. M. W. by the said J. T. W., conditioned to pay the amount of such award in instalments of one-fifth of the said amount each, as follows: one-fifth thereof in cash, and the balance in yearly instalments of one-fifth each, with interest on the same at seven per cent. per annum, payable half-yearly; and if any instalment shall remain unpaid for the space of ten days after the same may become due, then the whole amount remaining unpaid to become due and payable at the option of the said M. M. W. And the said parties do agree, that in case the said J. T. W. shall not, within thirty days after the said award shall be made, pay one-fifth of the said amount so awarded, and execute and deliver the bond in manner and form as above mentioned, and execute and deliver to

the said M. M. W. a mortgage on the one hundred acres of land opposite his house to secure the payment of the same, or pay the amount of the said award, less \$500, then this submission may be made a rule of the Supreme Court of the state of New Jersey, upon the application of either party." The arbitrators awarded that J. T. W. should pay M. M. W. the sum of \$5853.70. *Held*, that by this agreement J. T. W. was bound either to pay down the whole amount awarded, less \$500, or to pay one-fifth of the amount awarded in cash, and secure the balance by bond and mortgage, in thirty days after the date of the award. *Williams v. Winans*, 573

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2. As against a purchaser who holds a legal title, good on its face, by conveyance from one who is charged with fraud in acquiring it, it is necessary that the complainant should prove notice of the facts constituting the fraud. *Johns v. Norris,* 102

3. Tax deeds in Wisconsin, which omit the words "as the fact is," in the given form, are void. *Condit v. Blackwell.* 481

4. After acceptance of the deed for lands, possession taken, and payment of the purchase money, an action may be maintained where there is a mistake by omission or for repugnancy in the description, and the deed may be reformed. *Quære.* Whether a bill for specific performance is the proper form? *Conover v. Wardell.* 492

5. Where there is a particular recital in a deed, and general words are afterwards inserted, the generality of the words shall be qualified by the recital. The rule *falsa demonstratio non nocet* applies where there is repugnancy, and in such case the first grant by certain description

prevails over a subsequent and variant demonstration. *Ib.*

6. The terms "our homestead," "the Wardell farm," and "the premises which Henry Wardell died possessed of," used in the papers, will be controlled by the precedent particular description by metes and bounds, when followed by the words in the deed—"it being the same premises that Henry Wardell died possessed of, and it being hereby intended to convey to said Conover all the lands and premises lying within the above boundaries." They will not be held to include several strips of land lying outside of the boundaries, which were formerly part of the Wardell farm, and which have been separated therefrom, and advertised for sale in lots. *Ib.*

7. A deed, executed and acknowledged in this state by a sheriff for lands sold by him under execution, may be delivered in another state. *Walker v. Hill's Ex'rs,* 513

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1. If a husband drives his wife from his house, or uses personal violence or brutal treatment towards her, such as to indicate an intention to drive her away, or to render it

unsafe to live with him, the leaving his house for these reasons is a desertion by the husband; and if she be allowed to stay away for three years, without solicitation to return and proper assurances of better treatment, it would be a desertion by him sufficient to warrant a divorce. *Palmer v. Palmer*, 88

2. A willful and malicious refusal by a husband to permit a wife, who is discharging her own duties, to share with him such means of support as he may have, may be held to be an expulsion from his home, and constitute a desertion. *Ib.*

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1. A devise of a building lot to A, on condition that he will permit B "to carry on the business of a druggist on that part of the premises then occupied by him for his business of a druggist (being part of the first floor of said building), so long as he

should desire to use it for that purpose," created no easements in the adjoining lot for the use of the hydrant and for passage over said lot, in favor of B, though he had been allowed these privileges in the testator's lifetime. *Stanford v. Lyon*, 33

2. The devise to B, being only the privilege reserved of carrying on the druggists' business in the parts occupied by him at testator's death, is simply the right to occupy. *Ib.*

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EVIDENCE.

1. The liability of a defendant as the representative of a party dying *pendente lite*, like any other fact upon which a decree is founded, must appear by the record, and not by proof only. *Davis v. Headley*, 115

2. On proof that a declaration of trust of real estate has been signed according to the statute of frauds, but was lost, the trust will be established. *Bent v. Smith*, 500

3. The answer denies the fact of the trust and the written declaration as alleged in the bill. *Held*, that two witnesses are not necessary to overcome the positive and direct re-

sponse of the defendant under oath in his answer, but that it may be overcome and a decree made, either upon the strength of two witnesses, or one alone, with corroborative circumstances giving a turn to the balance or a preponderance of proof in favor of the complainant, and thereby producing conviction to the mind. *Ib.*

See DEED, 2.
USURY, 8.

EXECUTIVE.

See GOVERNOR.

EXECUTOR.

See WILL, 3.

FOREIGN JUDGMENT.

1. In the absence of any evidence to show the effect in the courts of another state, of a judgment or decree obtained in that state, this court must give such effect to the judgment as is indicated by the plain meaning of its words, and as would be given by the rules of law in this state to a like judgment of its own courts. *Davis v. Headley*, 115.
2. The reversal of a judgment generally, for a specified error alleged to be the only error, is a reversal of the whole judgment, and not only of the part held to be erroneous. *Ib.*
3. A judgment by a court of another state that a deed given for lands in this state is void, is a judgment as to the title of lands here, which that court has no jurisdiction to make. And it has no jurisdiction to decree a conveyance or delivery of possession founded on that decree. This rule is not varied by the Federal Constitution, or the act of Congress, declaring that the records and judicial proceedings of the courts of any state shall have such faith and credit given to them in the courts of another state, as they had by law or

usage in the courts of the state whence they were taken. *Ib.*

4. This court will not enforce a judgment of the courts of another state obtained by fraud. And in a court of equity it can make no difference whether the fraud is set up in defence, or is in support of a suit to restrain further proceedings on the judgment. It will not inquire into or examine the merits of such judgment; but when the case shown by the record is such that no court could, upon any principles of law, have given the judgment unless imposed upon, this will be regarded and taken as proof that the judgment was obtained by fraud on the court. *Ib.*
5. A court of equity will not entertain a suit for a specific sum of money, recovered by the judgment of a court in another state. *Ib.*

FORFEITURE.

See CONTRACT, 7.
MORTGAGE, 11.
USURY, 2.

FRANCHISES.

See RAILROAD COMPANY, 3.
STATUTE, CONSTRUCTION OF.

FRAUD.

See DEED, 2.
FRAUDULENT CONVEYANCE.
PLEADING, 5, 6.
PRINCIPAL AND AGENT.
SALE.
VENDOR AND PURCHASER.

FRAUDS, STATUTE OF.

See CONTRACT, 5, 9, 10.
PLEADING, 3.

FRAUDULENT CONVEYANCE.

1. Where a debtor has transferred his property to his wife, who holds it

for his use, and permits him to control and enjoy it, and he thereby defies and defrauds his creditors, it will not protect him, in a court of equity, that the forms of law have been pursued. *Metropolitan Bank v. Durant*, 35

2. No payment of consideration will protect any sale contrived and accomplished to defraud creditors, when the purchaser has knowledge of the object of the sale. *Ib.*

3. It is not sufficient to set aside a deed made by the grantor when in failing circumstances, that his object was fraudulent; it must be shown that the grantee participated in that intent, or had knowledge of the object of the grantor, or of such facts as should have put him upon inquiry as to that object. *Merchants National Bank v. Northrup*, 58

4. The mere fact that the grantee has heard of the grantor's suspension or failure in business, or of his being sued, is not in all cases sufficient to make a sale fraudulent or the deed void. *Ib.*

FUNERAL EXPENSES.

See WILL, 2, 5.

GIFT.

A policy of insurance was taken by a wife on the life of her husband, in favor of and made payable to her children. After the payment of several premiums she assigned the policy in payment of a debt of her husband, and thereupon the assignee paid several successive premiums. After the death of the husband, the children filed their bill claiming the whole sum insured. *Held*, that they were entitled only to the value of the policy at the time of its assignment, on the ground that the gift from the mother to them was executed only to that extent. *Landrum v. Knowles*, 594

GOVERNOR.

1. Every person, whatever his office

or dignity, is bound to appear and testify in courts of justice when required to do so by proper process, unless he has a lawful excuse. The dignity of the office, or the mere fact of official position, is not of itself an excuse; and whether the official engagements are sufficient, must be determined by the circumstances of each case. *Thompson v. German Valley R. Co.*, 111

2. The Governor will not be compelled to produce in court any paper or document in his possession; he will be allowed to withhold it, or any part of it, if, in his opinion, his official duty requires him to do so. *Ib.*

3. The Governor cannot be examined as to his reasons for not signing an act of the legislature, nor as to his action in any respect regarding it. But he is bound to appear and testify as to the time an act was delivered to him. *Ib.*

4. An order to testify is an unusual practice, and ought not to be made against the Executive of the state. *Ib.*

5. In the case of the Executive, the court would hardly entertain proceedings to compel him to testify by adjudging him in contempt. It will be presumed that the Chief Magistrate intends no contempt. *Ib.*

6. If the Governor, without sufficient or lawful reason, refuses to appear and testify, he is, like all other citizens, liable to respond in damages to any party injured by his refusal. *Ib.*

GRANT.

See STATUTE, CONSTRUCTION OF.

HEIR.

See ADMINISTRATOR.
SALE.

HIGHWAY.

See INJUNCTION, 21, 22.

HUSBAND AND WIFE.

See MARRIED WOMEN:
MORTGAGE, 2, 3, 24.
PLEADING, 9.
SEPARATE ESTATE.
SETTLEMENT.

INFANT.

See WILL, 5.

INJUNCTION.

1. Filling the air around a dwelling-house with dense smoke and soot or cinders, or with noxious or offensive vapors or odors, or with annoying noises, to such a degree as will render living in the house uncomfortable to persons of ordinary sensitiveness on those matters, is a nuisance and unlawful injury, which will be restrained by injunction. *Duncan v. Hayes*, 25
2. If the title of the complainant is not disputed, and the injury is clear, it is not necessary that the fact of nuisance should be first established by a verdict at law. *Ib.*
3. It is well settled that a court of equity will not restrain, by injunction, any lawful business, or the erection of any building or works for such business, because it is supposed or alleged that such business will be a nuisance to a dwelling-house near it; it must be clear that the business will be a nuisance, and that it cannot be carried on so as not to be such. *Ib.*
4. Where the building or machinery is of itself no nuisance, the erection will generally not be stopped, but the defendant will be allowed to go on with it at the risk of not being permitted to use them in any way so as to cause a nuisance. *Ib.*
5. As to the business itself, if it is not clearly shown that it will be a nuisance in the way it is meant to be carried on, the court will not restrain it, but will compel the complainant to wait for his protection until it is in operation, and it can be shown, without doubt, whether it is a nuisance or not. *Ib.*
6. No lawful occupation will be restrained or interfered with, unless it will actually interfere with the comfortable enjoyment of life, and it appears beyond any reasonable doubt that it will so interfere. *Ib.*
7. In a doubtful case, where the injury by prohibiting the business is great and certain, and the injury to the complainant, when it may occur, can be speedily remedied by an injunction applied for after the fact of nuisance is ascertained by experiment, the defendant, after being warned of the peril, will, in general, be allowed to proceed at his own risk, until the complainant is actually injured. *Ib.*
8. That the business proposed to be carried on by the defendant would injure the prestige of the complainant's house, make it less desirable for the better class of boarders who frequent it, and thus lessen her profits, is no ground for an injunction. *Ib.*
9. Increased risk from fire, and the consequent large rates of insurance, constitute no ground for injunction. *Ib.*
10. To entitle a party to a preliminary injunction, his right in the subject matter in dispute, and to the remedy applied for, must be clear to the court, and free from reasonable or serious doubt, or established by proceedings at law. *Hack. Imp. Commission v. N. J. Midland R. Co.*, 94
11. If the facts upon which the right depends are established or admitted, and the principles of law which, on those facts, would give the right, are settled and established in this state, it is not always necessary that the claim of the complainant should have been established in a suit at law. The Chancellor may, in such cases, apply the principles as settled by the courts of law to the facts, and allow the injunction. *Ib.*

12. But when the principles of law on which the right rests are disputed, and will admit of doubt, a court of equity, although satisfied as to what is the correct conclusion of law upon the facts, may not, upon the opinion of the equity judge, without a decision of the courts at law establishing such principles, grant the injunction. *Ib.*
13. An injunction will not issue, when the benefit secured by it is of little importance, while it will operate oppressively and to the great annoyance and injury of the defendant, unless the wrong complained of is wanton and unprovoked. *Ib.*
14. The right of the complainants to an injunction depending upon the construction of conflicting provisions in a statute, and the construction of such provisions never having been settled by the courts of law, this court cannot interfere. *Ib.*
15. An injunction will not be granted, unless the right of the applicant, alleged to be violated by the proceedings sought to be restrained, is settled and clear. *Black v. Del. & Rar. Canal Co.,* 130
16. It is not always necessary that the right or title of the applicant for an injunction should have been settled by an adjudication of a court of law. If the facts on which the right is founded are admitted or clearly established, and the principles of law on which it depends have been adjudicated or are settled, a court of equity may apply these principles to the facts, and grant an injunction upon a right so ascertained. *Ib.*
17. But where the facts are doubted, or the principles of law on which the right of the applicant depends, are disputed and may admit of doubt, and have not been adjudicated and established by the courts of law in this state, an injunction will not be granted until the right of the complainant has been established at law. *Ib.*
18. The canal company having filed their bill to restrain the defendants from occupying land, alleged to belong to the complainants, for their canal and embankment, an injunction was denied on final hearing, on the grounds that the title to the premises was in dispute and open to reasonable doubt, and that for the injury complained of an adequate remedy existed at law. *Morris Canal and Banking Co. v. Fagin,* 430
19. The principles by which injuries are tested in their character as nuisances, for the prevention or suppression of which courts of equity administer injunctive relief, are substantially the same, whether such nuisances be private or public. In either case, the injury must be such as the courts of law cannot adequately redress. *Ib.*
20. An injunction will not be granted where an action of ejectment will restore the complainant to all his rights. *Ib.*
21. Considering the canal as a public highway, the granting of an injunction to restrain encroachments on it will depend upon the extent to which such encroachments impede navigation. *Ib.*
22. Where, as in the present case, the alleged encroachment does not materially narrow the water way within the width it has for navigation, above and below the place where such encroachment exists, and does not interfere with the tow path, the injury, if a public nuisance, can be remedied by indictment; and if a private one, and the complainants claim title to the land, an action at law will afford sufficient protection and relief. *Ib.*
23. A preliminary injunction will not be granted on doubtful points of constitutional law; nor to restrain the execution of laws because the authority delegated by them may be used unwisely, or injuriously to the public. *Inhabitants of Greenville v. Seymour,* 458

24. This court will not interfere with the exercise of delegated powers, within the limits allowed by the acts conferring them, but the perversion or abuse of such powers, either actual or threatened, will be restrained, when made to appear.

Ib.

25. In this case an injunction denied because the provisions of the acts, however impolitic or oppressive, were within the power of the legislature to enact, and no sufficient cause was shown to interfere with the action of the commissioners. *Ib.*

26. Where the question is whether a certain act done by the trustees in their corporate capacity, be within or without their power, the corporation is a proper and necessary party; but where such act has been enjoined, the injunction will not necessarily be dissolved on account of the non-joinder of such party. *Morgan v. Rose*, 583

27. The general rule is that an appeal will lie from all orders either granting, refusing, sustaining, or dissolving injunctions. *Ib.*

INTEREST.

See MORTGAGE, 9, 11, 13, 14, 16, 17.
TENDER, 2.
WILL, 1, 3, 5.

JUDGMENT.

See FOREIGN JUDGMENT.

JURISDICTION.

MISTAKE, 2.

PRACTICE, 3.

SALE OF LAND FOR PAYMENT OF DEBTS.

JUDGMENT CREDITOR.

See SALE OF LAND FOR PAYMENT OF DEBTS, 3.

JURISDICTION.

After a cause has been heard upon the

merits, the judgment properly entered, and the papers remitted to the court below, the Court of Errors has no further jurisdiction with respect to the case. *King v. Ruckman*, 551

See CONTRACT, 6.

FOREIGN JUDGMENT, 3, 5.

LACHES.

Relief will not be denied by reason of laches in filing the bill to establish the trust, if the delay is satisfactorily explained. *Bent v. Smith*, 560

See SPECIFIC PERFORMANCE, 4, 5.

LEASE.

See RAILROAD COMPANY.

LEGACY.

See WILL, 3-6, 8.

LEGAL TENDER.

See MORTGAGE, 6.

LIEN.

See MORTGAGE, 8.

SALE OF LAND FOR PAYMENT OF DEBTS, 2.

LIFE INSURANCE.

See GIFT.

LIS PENDENS.

1. Lis pendens filed, without any bill having been filed as a constructive notice, is a nullity. *Walker v. Hill's Ex'rs*, 513

2. Bill filed and subpoena served are necessary before a *lis pendens* becomes constructive notice to persons who shall acquire title from

parties to the suit, *pendente lite*.
Haughwout v. Murphy, 531

3. The commencement of a suit in chancery is constructive notice only as against persons acquiring title or an interest in the property in litigation after the suit is commenced. A person whose interest existed at the commencement of the suit, will not be bound by the proceedings unless he be made a party to the suit. *Ib.*

MAINTENANCE.

See WILL, 2, 5, 6,

MARRIED WOMEN.

1. A married woman has no power to charge her separate estate by any writing, even though it contain words which show a clear intention to bind such estate, except a mortgage acknowledged as required by law, or for debts contracted for the benefit of her separate estate, or for her own benefit on the credit of it. *Perkins v. Elliott*, 127
2. The words, "the said obligation to be charged upon the separate estate of the said Louisa Elliott," in a note, signed by a married woman as surety for her husband, do not create a lien upon her separate estate. *Ib.*

MEDICAL EXPENSES.

See WILL, 2.

MISREPRESENTATION.

See SPECIFIC PERFORMANCE, 1.

MISTAKE.

1. To correct deeds for fraud or mistakes in them, is one of the ancient and well established heads of equity jurisdiction, and it is the duty of the court, where such fraud or mistake is clearly proved, to correct it by any means in its power to effect,

the amendment and the object of it.
Loss v. Obry, 52

2. Mistakes are corrected, even where they occur in the records of proceedings of courts, and exist in the records themselves. This is done, not by reviewing the judgments or proceedings of the courts, but by restraining the parties who may take advantage of such mistakes, from doing so, or by compelling them to execute proper papers for the purpose of such correction. *Ib.*
3. The defendants having refused to correct the mistake in the deeds, after it was brought to their notice, and defended the suit when they knew it was wrong and against good faith to defend it, must pay the costs. *Ib.*

See DEED, 4.
 PRACTICE, 3.

MONEY.

See PAYMENT INTO COURT.

MORTGAGE.

1. A mortgage that has been satisfied and delivered up to the mortgagor without being canceled, may be again delivered as a valid security by the mortgagor, and such new delivery gives it new vitality against the mortgagor, but not as against intervening encumbrancers. *Underhill v. Atwater*, 16
2. The mortgage of a married woman given as collateral security for the debts contracted by the brother of her husband in continuing and preserving the former business of the husband, for his benefit, is satisfied and discharged by the release of the brother from such debts. It cannot be pledged by her husband for another purpose without her authority. *Ib.*
3. But when the brother was discharged from his debts on condition that the assets of the business should be assigned by him in payment of them, and that the cred-

- itor should retain the mortgage as security for the payment of the debts so assigned, such retention of the mortgage is for the purpose for which it was given, collateral security for the debts of the husband's brother; and the husband would have power to continue the mortgage for that purpose without further consent of his wife, were it not that by this arrangement she could no longer call upon the brother, for whom alone she was surety. *Ib.*
4. Although no express power is given to use or pledge a mortgage for a particular purpose, such power may be inferred from the circumstances of the case, the situation of the parties, and the general object for which the mortgage was given. *Ib.*
 5. A complainant to whom a mortgage has been assigned as security for a specific debt, can only have a decree for that debt, although pending the foreclosure suit the whole mortgage is absolutely assigned to him. His remedy for the residue must be by supplemental bill or petition for surplus. *Ib.*
 6. The law as to the effect and constitutionality of acts of Congress must be received by the state courts, as it may be from time to time determined and declared by the Supreme Court of the United States. Hence, under the recent decision of that court, declaring the act of 1862, making the notes of the Government a legal tender for all debts, constitutional, a mortgage made before the passage of that act is payable in such notes. *Stockton v. Dundee Man'g Co.*, 56.
 7. A change in the law, by decision, is retrospective, and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it. Hence, a tender having been made in United States notes before the commencement of this suit, the mortgage debt must be considered as legally tendered. *Ib.*
 8. But a tender of the mortgage debt does not, in this state, discharge the lien of the mortgage. *Ib.*
 9. The money not having been paid into court, or kept on hand uninvested since the tender, the mortgagors are not discharged from the interest. *Ib.*
 10. Defendants allowed sixty days to pay the mortgage debt, with interest; if paid within that time, no costs will be allowed; if not paid, there must be a decree for the sale of the mortgaged premises, for the debt, with interest and costs. *Ib.*
 11. W. filed a bill to foreclose a mortgage, dated January 2d, 1868, given to him by S. and wife on lands in Hoboken. The condition of the mortgage was for the payment of the principal in three years, with interest half yearly, with a provision that if not paid within thirty days after it was payable, the principal should be due at the option of the mortgagee. The mortgage was given to secure the purchase money of the premises. The deed contained a covenant that the premises were free from "all assessments and encumbrances of what nature or kind soever." The municipal authorities of Hoboken had constructed a sewer near these premises which was finished before this conveyance, and had assessed upon the premises \$204, as their share of the expenses. These proceedings had been taken to the Supreme Court by certiorari. W. and S., at the date of the deed, entered into an agreement, under hand and seal, that if the Supreme Court should decide the assessment legal and a lien upon the premises, W. should pay the assessment; but if the decision should be in favor of W., he should be held harmless from all charges for building the sewer. The Supreme Court confirmed the proceedings relative to the construction of the sewer prior to the assessment of the expenses on these lots, and set aside the assessment. By the same order they appointed three new commissioners to assess upon these lots their share of the expenses of constructing that sewer. They made a new assessment, Au-

gust 10th, 1869, of \$254. This assessment was confirmed by the common council, September 24th, 1869. The interest due on the mortgage July 2d, 1869, had been paid. January 2d, 1870, S. served a notice on W. that the assessment had been made anew and confirmed, and unless W. paid it, he should claim a deduction to that amount from the mortgage. W. did not pay it, and S., within the thirty days, tendered to W. the amount of interest due on the principal of the mortgage, less the assessment and costs for which the lots were liable. This tender was refused, and the bill was filed to foreclose the mortgage, setting out that the interest not having been paid within the thirty days, the complainant had elected to consider the mortgage as due. S. filed a cross-bill. *Held*, that the agreement not providing for the result of the decision, it does not affect the question between the parties, which must be determined by the effect of the covenant in the deed against assessments and encumbrances. W. must, therefore, relieve the premises from the encumbrance, and S. is entitled to have the amount deducted from his mortgage. That tender of the interest on the balance saved the forfeiture. That the cross-bill was unnecessary to set up defence. *White v. Stretch*, 76

12. A covenant that the premises conveyed are free from "all assessments and encumbrances of what nature or kind soever," binds the grantor to pay off an encumbrance existing at the date of the deed. And in a suit to foreclose the purchase money mortgage, the amount of such encumbrance must be deducted from the amount due on the mortgage, and the decree will be only for the balance. *Ib.*

13. Where the bond and mortgage call for interest, without naming the rate, the rate fixed by the law at the date of the instruments will be chargeable. *Ackens v. Winston*, 444

14. Where the mortgage is recorded in full, and provides for the pay-

ment of interest during the ten years, at the end of which the balance of principal is to be paid, without saying how often during such time, a purchaser of the mortgaged premises has notice from the record that some periodical payments of interest were intended, and the fact that these payments were to be yearly, may be proved so as to bind him. *Ib.*

15. Such proof does not contradict or alter the terms of the instruments, or their expressed meaning, but supplies their obvious omissions and corrects their ambiguities, subject to which the purchaser bought. *Ib.*

16. It appearing that yearly payments were intended, *held*, that this should be decreed to be the true construction of the mortgage, and that the complainant was entitled to recover the interest for each year remaining unpaid, and, under the circumstances of the case, the costs of the suit. *Ib.*

17. Where the mortgage in such case provided that in default of payment of interest within sixty days after the same became due, the whole principal should be immediately due, the payment of such principal was not enforced, because the conditions on which immediate payment depended were not stated with sufficient explicitness. The true interpretation and construction of the conditions being settled, they may be operative as to the future, but not as to the past. *Ib.*

18. The mortgagee in possession held to account for rents, at the rate agreed on between the parties during the year prior to the maturity of the mortgage. *Shields v. Lozeau*, 447

19. A deed given as security decreed to be a mortgage, and the grantor allowed to redeem. *Sweet v. Parker*, 453

20. A mortgagor, after his equity of redemption is sold, is not a neces-

sary party to a bill for foreclosure. *Andrews v. Stelle*, 478.

21. If made a party, and he sets up the defence of usury, he has a right to appeal from a decree against him, because the decree would bar him from setting up the same defence to a suit on the bond. *Ib.*

22. It does not necessarily follow from the right of such defendant to an appeal, that a court of equity would refuse to appropriate the proceeds of the mortgaged premises to the satisfaction of the usurious security, at the instance of a party who has no interest in the fund. *Ib.*

23. A mortgage given for a specific purpose must be applied exclusively to that purpose, and any other disposition of it will be a fraudulent misappropriation, against which the mortgagor will be entitled to relief. *Atwater v. Underhill*, 599.

24. A husband was the agent of his wife in the making and delivery of a mortgage on her estate, which was made to A specifically as security for the debt of B. The debt being extinguished by the release of the principal debtor: *Held*, that the husband, under the authority to deliver the mortgage for the purpose for which it was made, had no authority to re-pledge the mortgage to A as security for the collection of assets which had been transferred by the debtor to A in satisfaction of the debt. *Ib.*

See ASSIGNEE.

PAROL.

RELEASE, 2.

TENDER, 1, 2.

MORTGAGEE AND MORTGAGOR.

See DECREE.

MORTGAGE, 1, 18, 20, 23.

NOTICE.

See DEED, 2.

LIS PENDENS.

MORTGAGE, 14.

NUISANCE.

See INJUNCTION, 1-7, 19.

ORPHANS COURT.

See SALE OF LAND FOR PAYMENT OF DEBTS, 1.

PAROL.

In a suit to have a deed absolute on its face decreed to be a mortgage, parol evidence is admissible, not to establish an agreement to reconvey which equity will enforce, but to establish the true nature of the instrument by showing the object for which it was made. *Sweet v. Parker*, 453.

See PAYMENT INTO COURT.

SPECIFIC PERFORMANCE, 3.

VENDOR AND PURCHASER, 2.

PARTIES.

1. Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit. Where it is the *interest* which the court is considering, and the owner merely as the guardian of that interest, and others are present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be required. *Sweet v. Parker*, 453.

2. Where the fund is in the hands of a trustee for the life of a parent who takes a life interest, and her children the principal upon her death, and in a suit affecting such fund the trustee and parent are defendants, an objection taken at the hearing for want of parties because the children have not been joined as defendants, will not prevail. The interest of the children has been protected by their representatives. *Ib.*

See INJUNCTION, 26.

LIS PENDENS, 3.

MORTGAGE, 20, 21.

PLEADING, 1, 2.

PARTITION.

1. Bill for an account of rents, and for partition of a strip fifty feet long by five feet wide, being the rear boundary line of the lots of the complainant and defendant. Decree, that each party is entitled to the half of the strip which adjoins his own premises, and, if the parties are agreed as to the direction of the line, division will be ordered to be made by a line drawn through the middle of the strip, parallel to and equally distant from the sides, without the delay or expense of appointing commissioners. *Davidson v. Thompson*, 83
2. In partition, where the widow consents to take a gross sum in lieu of dower, and then dies, the fact of her death cannot affect the valuation to be made of her interest in the lands. It is her expectancy which is to be valued, and not the actual value of her life estate as it has turned out to be. *McLaughlin v. McLaughlin*, 505
3. The right of the widow becomes vested by her consent, and her subsequent death cannot affect such vested right. The case of *Mulford v. Hiers*, 2 *Beas.* 13, followed. *Ib.*
4. *Held*, in this case, that at the time the widow agreed to take a gross sum, her life was of the value of the average of persons of her age in ordinary health, and that a decree must be made on that basis. *Ib.*

PAYMENT INTO COURT.

Money will not be ordered to be paid into court, which is not ascertained to be due by an account or decree in the cause, or admitted to be due by the answer or other proceedings in the cause. A parol admission proved by affidavit is not sufficient. *McTighe v. Dean*, 81

See TENDER, 2.

PLEA.

See PLEADING, 7.
TENDER, 2.

PLEADING.

1. In equity all suits must be in the name of the party really interested, and where the name of an agent or trustee is used, the *cestui que trust* must be made complainant with him. *Nichols v. Williams*, 63
2. A corporation is a necessary party to a suit in equity, brought in the name of the president, to enforce a contract signed by him as president and on behalf of the corporation. *Ib.*
3. If an answer denies making an agreement stated in the bill, it is not necessary to plead the statute of frauds; the complainant must prove a *valid* agreement, which, in all cases within the statute, must be in writing. *Johns v. Norris*, 102
4. A mere defect of title is no defence to a bill for the foreclosure of a mortgage given for the purchase money of the mortgaged premises. *O'Brien v. Hulfish*, 471
5. But where the vendee has been defrauded, the court will not permit, in a proper case, the mortgagee to compel the payment of the money without deduction, if such fraud and resulting damage are made to appear in the proper mode. *Ib.*
6. Such fraud, when the vendee is not in a position to rescind, must be set up by a cross-bill. *Ib.*
7. The defence of a bona fide purchase may be made by plea, in bar of discovery and relief, or by answer, in bar of relief only. Proof of the actual payment of the whole purchase money is essential to that defence, whether it be made by plea or answer. If the defendant has been paid part only, he will be protected *pro tanto* only. *Haughwout v. Murphy*, 531

8. Where a defendant answers by favor of the court, he must be restricted to an equitable answer; where he has a right to answer, such limitation cannot be imposed. *Vander-veer's Adm'r v. Holcomb*, 555

9. Where husband and wife are properly made defendants to a bill, the complainant is entitled to a joint answer, and a separate answer may be suppressed. *Ib*

10. When the complainant is entitled to an equitable answer, he may appeal, if the defendant is permitted to set up usury without offering to pay the sum actually due. *Ib*

11. M. M. W. filed a bill against J. T. W. and certain alleged fraudulent encumbrancers and grantees, praying that J. T. W. might be specifically decreed to perform his agreement, and that the alleged fraudulent mortgages and conveyances might be declared fraudulent and void as against the plaintiff. After answer and replication, a supplemental bill, or bill in the nature of a supplemental bill, was filed against the original defendants and one D. C., in which it was charged that the original defendants, or some of them, procured a sheriff's sale of the said property on certain paid judgments against J. T. W., with intent to defraud the plaintiff of his rights under the award, and the prayer of the bill was that the sheriff's deed to D. C. might be decreed to be fraudulent and void. *Held*, that inasmuch as it was alleged that D. C. was only the trustee of a naked trust, and that the property was bought at the sheriff's sale by the original defendants, or some of them, in the name of D. C., to enable them the more effectually to accomplish the original fraudulent design, the plaintiff could maintain his supplemental bill. *Williams v. Winans*, 573

12. The defendants who answered the original bill having in their answers specifically alleged a want of equity in the plaintiff's case. *Held*, that it was proper to consider and decide

on demurrer to the supplemental bill the question thus raised. *Ib*.

See ANSWER.
CONTRACT, 4.
USURY, 7.

POLICY OF INSURANCE.

See GIFT.

PRACTICE.

1. The writ of assistance can only issue against persons who are parties to the suit, or who came into possession under a defendant after its commencement. But in all cases the parties in possession and against whom the writ is applied for, should have notice of the application, and are entitled to be heard on it. *Blauvelt v. Smith*, 31

2. This writ is a summary process, only used when the right is clear, and when there is no equity or appearance of equity in the defendant, and where the sale and proceedings under the decree are beyond suspicion. *Ib*.

3. A judgment entered by mistake may be amended, or, if procured by fraud, may at any time be set aside. *King v. Ruckman*, 551

4. This court may order a re-argument while a cause is still pending, and before the papers have been remitted. *Ib*.

5. *Quere* Whether motion for a re-argument will in any case be entertained unless it proceed from some member of the court who concurred in the judgment. *Ib*.

6. When a final decree involves the merits of the case settled by the interlocutory decree, an appeal from the final decree brings the whole case before the court. *Crane v. Decamp*, 614

See MORTGAGE, 5.
TENDER, 2.

PRINCIPAL AND AGENT.

1. In a contract of purchase and sale between attorney and client, or principal and agent, the burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney or agent, and in the absence of such proof, courts of equity treat the case as one of constructive fraud. In case of trustee and *cestui que trust*, the contract may be avoided at the option of the *cestui que trust*. *Condit v. Blackwell*, 481
2. The application of the rule which measures the duty of an agent, makes this a case of constructive fraud. *Ib.*
2. The works of the United Companies form both connected and continuous lines with the works of the Pennsylvania Railroad Company. Two railroads form a continuous line, when their tracks and rails join so that a train may pass from the tracks and rails of one directly upon those of the other. They form a connected line, when this is done by means of an intervening or connecting road. *Ib.*
3. The directors of these companies have power to sell, or otherwise dispose of any of the property of the companies, except the roads and canal, and the franchises granted, without the consent of the state or of all the stockholders. *Ib.*

PUBLIC USE.

See RAILROAD COMPANY, 6.

PURCHASER.

See DEED, 2.

FRAUDULENT CONVEYANCE, 2-4.

SALE OF LAND FOR PAYMENT OF DEBTS, 1.

SPECIFIC PERFORMANCE, 5.

VENDOR AND PURCHASER.

RAILROAD COMPANY.

1. The act of March 17th, 1870, authorizing the United Railroad and Canal Companies of New Jersey "to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company or companies in this state or otherwise, with which they are or may be identified in interest, or whose works shall form with their own, continuous or connected lines, or to make such other arrangements for connection or consolidation of business with any such company or companies by agreement, contract, lease, or otherwise, as to the directors of said United Companies may seem expedient," gives authority to the United Companies to lease to a corporation of another state. *Black v. Del. and Rar. Canal Co.*, 130
5. A lease made by virtue of such authority, is within the power delegated to the directors, and there is, in the charter of these companies, no express or implied contract violated by it, and, therefore, the act authorizing it is not unconstitutional. *Ib.*
6. The purpose for which these works are leased, the benefit and advantage of extended public highways, controlled and operated by one head, for regular and easy communication from and through New Jersey and other states, is a public use for which property may be taken by condemnation. *Ib.*
7. Even if the directors had not power to lease for a term, so as to bind the stockholders or their successors, the leasing and delivering the works to the lessee, with a stipulation and obligation to have the shares of dissenting stockholders valued and paid for, is not taking property without first making compensation. The shares, and not the works, are the property of the stockholders, and these are not taken until paid for. *Ib.*

8. The Pennsylvania Railroad Company, the proposed lessee, has, by its charter and supplements, and the public laws of Pennsylvania, power to take the lease, and bind itself to all its stipulations. The courts of one state, in construing the statutes of another state, will be governed by the decisions of the courts of that state. *Ib.*

READINESS TO PAY.

See TENDER, 3.

RE-ARGUMENT.

See PRACTICE, 4, 5.

RECEIVER.

See CONTRACT, 3.

RELEASE.

1. An agreement between a creditor and his debtor that the former shall take the business of the latter and be responsible for and pay all the business debts, operates as a release of a debt of such creditor which is shown to be a debt connected with such business. *Atwater v. Underhill*, 599.
2. The release of a debtor from all liability for a debt, is also a release and discharge of the mortgage of a third person given as collateral for such debt. *Ib.*

See MORTGAGE, 2, 24.

RELIGIOUS SOCIETIES.

1. The act to incorporate the trustees of religious societies does not, *proprio vigore*, do more than vest the legal title in the ecclesiastical property in such trustees. *Morgan v. Rose*, 583.
2. The statute was designed to create a simple trust, so that the trustees must hold and dispose of the property in conformity to the directions

of their *cestuis que trust*, who may be, either the congregation, or certain officials, according to the rules or discipline of the particular church or society. *Ib.*

RENT.

See DOWER.

MORTGAGE, 18.

TENANT IN COMMON.

RESIDUARY LEGATEE.

See ADMINISTRATION.

REVOCATION.

See WILL, 8.

SALE.

1. A purchase of the real estate of an intestate at a foreclosure sale by one who, by contrivance or fraud, had prevented a sale for a fair value, will be set aside as against the heir. But this relief will not be granted against a subsequent bona fide purchaser for a valuable consideration, without notice of the contrivance or fraud. *Johns v. Norris*, 102.
2. A widow who procures a person to purchase at a foreclosure sale the real estate of her late husband at prices far below its real value, by the contrivance agreed upon to deter bidders, by giving out that the purchase is for the benefit of the widow and her family, is a party to the fraud against the heir and creditors, and does not come into court with clean hands to compel the confederate to convey to her. *Ib.*

See ADMINISTRATOR.

DECREE.

FRAUDULENT CONVEYANCE, 2, 4.

SALE OF LAND FOR PAYMENT OF DEBTS, 1.

SALE OF LAND FOR PAYMENT OF DEBTS.

1. A sale and conveyance by an exe-

cuter under an order of the Orphans' Court for the payment of testator's debts, obtained after the lapse of a year from testator's death, vests in the purchaser only such estate as the heir or devisee was seized of at the time of making the order for sale. *Bockover v. Ayres*, 13

2. A judgment against such devisee is unaffected by such sale and conveyance, it remains a lien on the land. *Ib*

3. The judgment creditor, in such case, has no right to any part or share of the surplus of the purchase money in the executor's hands after the payment of debts. *Ib*

SEPARATE ESTATE

A husband has no power, by virtue of the marital relation, to dispose of his wife's separate property. He may become her agent in the management and disposal of it, but the validity of his acts and the extent of his power will be measured, as in the case of other agents, by the scope of the authority his principal has conferred. *Atwater v. Underhill*, 599

See MARRIED WOMEN

SETTLEMENT

Whether the amount of property settled by a husband upon his wife, in adjusting a suit for divorce, is greater than was reasonable, can not be examined into, if he was of sufficient capacity to make the conveyance and to adjust the difficulties between himself and his wife. *Dixon v. Dixon*, 91

SHERIFF'S SALE

See DECREE.

SPECIFIC PERFORMANCE.

1. A representation that a public alley over part of the premises is only a private right of way in a few persons, when made by mistake, and

when the rights in the property are substantially the same in either case, is not such a misrepresentation as will bar specific performance. *Wuesthoff v. Seymour*, 66

2. Specific performance will not be enforced where the contract does not designate, with certainty, the lands to be conveyed. *Carr v. Land Improvement Co.*, 85

3. A resolution "that two acres be sold," is vague and uncertain upon its face. The uncertainty is patent, and parol proof is inadmissible to explain it. *Ib*.

4. Unreasonable delay in bringing suit for the specific performance of a contract to convey, will be a defence to the relief, especially where the other party has made improvements in the mean time, or the property has greatly increased in value. *Johns v. Norris*, 102

5. Where the subsequent purchaser has accepted a conveyance, and paid part of the purchase money in good faith before notice of a prior contract, if the first purchaser wishes to enforce his right to a conveyance of the lands, he must seek his remedy promptly. He may lose his right to specific relief by a conveyance of the land, by laches, and be remitted to the unpaid purchase money as the only relief that will be equitable. By accepting an assignment of a security taken for such unpaid purchase money, he will be held to have affirmed the sale. *Haughwout v. Murphy*, 531

See CONTRACT, 1, 2, 6, 9, 10.

STATUTE, CONSTRUCTION OF

A statute to authorize a corporation to lease or transfer the franchises, rights, and powers granted to it, unto another corporation, with no increase of franchises or privileges is not such grant by the state as requires the same strict rule of construction, that is applied where the state creates franchises, or originally grants rights. It relates to

the transfer of the rights and property of one citizen to another. *Black v. Del. & Har. Canal Co.*, 130

See INJUNCTION, 14.

MORTGAGE, 6.

RAILROAD COMPANY, 1, 8.

SUPPLEMENTAL BILL.

See MORTGAGE, 5.

PLEADING, 11, 12.

SURPLUS.

See ADMINISTRATOR.

MORTGAGE, 5.

SALE OF LAND FOR PAYMENT OF DEBTS, 3.

SURPRISE.

See DECREE.

TAX DEED.

See DEED, 3.

TENANT IN COMMON.

A tenant in common is not, in general, accountable to his co-tenants for rents; but when he takes possession of the premises, and excludes his co-tenant and takes the rent therefor, he must account for the rent, deducting expenses for repairs and taxes. *Davidson v. Thompson*, 83

TENDER.

1. Tender of the amount due on the mortgage, after its maturity and acceptance refused by the mortgagee in possession—*held*, in this case, on bill to redeem, to entitle the complainant to a decree with costs. *Shields v. Lozeau*, 447

2. The effect of a tender lawfully made is to discharge the debtor from subsequent interest and costs. But to have this effect, the amount tendered must be kept in readiness, and on bill to redeem, or on plea

or answer setting up tender, the money must be paid into court. No less strictness is required in such cases in equity than at law. *Ib.*

3. Differences among the authorities as to the meaning of the term "readiness to pay." *Ib.*

See MORTGAGE, 7-9, 11.

THREAT.

When a suit for separation and maintenance is proper to be brought, neither that nor an avowed determination to persevere in it can be considered as a threat. *Dixon v. Dixon*, 91

TRUST.

See CONTRACT, 5.

EVIDENCE, 2.

TRUSTEE.

See ADMINISTRATOR.

UNITED COMPANIES.

See RAILROAD COMPANY.

USURY.

1. To support the defence of usury, the evidence must be clear and cogent. *Morris v. Taylor*, 438

2. The act of April 12th, 1864, respecting usury, does not do away with the forfeiture, though it lessens the severity of the penalty. The same strictness of proof is required since the act as before. *Ib.*

3. The fact of usury being exclusively within the knowledge of the parties, and their testimony respecting it conflicting, each testifying from recollection, and without any book of account or other record of their mutual dealings resulting in the mortgages alleged to be usurious; and neither being able to give a satisfactory statement of the various

payments, loans, or securities included in the mortgages; *held*, that the usury was not established by the proofs. *Ib.*

4. Where notes on which illegal interest had been reserved are included in a settlement of what is due between the parties, and a mortgage given upon a new agreement for the amount, the usurious taint will be extinguished. *Ib.*

5. As between the parties to an usurious instrument, or as against a subsequent holder with knowledge of the defect, the original taint of usury attaches to all substituted obligations or securities however remote, unless the transaction be purged of the original vice by expunging the usurious element. *Taylor v. Morris*, 606

6. A new settlement of the accounts between the borrower and lender, and the cancellation of the original security, or the introduction of a new consideration in the shape of an additional loan, will not operate to give validity to any succeeding obligation which secures the usurious exaction. *Ib.*

7. In setting up a defence of usury in a suit in chancery, the defendant must in his answer, as in a plea of usury in an action at law, set out the particular facts and circumstances of the supposed usurious agreement, that the court may see that the agreement was in violation of the statute. *Ib.*

8. The burden of proof is on a defendant alleging usury, and the defence must be sustained by such preponderance of evidence as establishes the truth of the allegations on which it depends beyond a reasonable doubt. *Ib.*

See MORTGAGE, 21, 22.
PLEADING, 10.

VENDOR AND PURCHASER.

1. A failure to disclose facts within the knowledge of the seller of lands,

to constitute fraud, must amount to a suppression of such as he is bound, under the circumstances, in conscience and duty to disclose to the purchaser, and in respect to which he cannot, innocently, be silent. Where there is no fraud or mistake in such facts, a party may properly be remitted to his remedy at law. *Conover v. Wardell*, 492

2. The papers executed by the parties relating to the purchase and sale of land may all be used, and they settle the meaning of the descriptive words and names used in these dealings, in preference to any other construction. Parol evidence of such meaning must be rejected where the conflict is apparent. *Ib.*

3. In equity, upon an agreement for the sale of lands, the vendee, after the contract, is regarded as the equitable owner, and if the vendor thereafter sells the lands, he is considered as selling it for the benefit of the first purchaser, and liable to account to him for the profits of the second sale; or if the second purchaser is a purchaser with notice of the previous contract, he may be compelled to convey to the first purchaser. *Haughwout v. Murphy*, 531

See PLEADING, 5, 6.

WIDOW.

See DOWER.
PARTITION, 2, 4.

WILL.

1. A testator directed \$40,000 to be held in trust for his grandson, to be paid to him when he arrived at the age of twenty-five years, with the increase thereon by accumulation. The testator died in 1856. The executors did not separate any sum of \$40,000 from the rest of the estate for the purpose of this trust. The great bulk of the estate remained invested in the stock of the Society for Useful Manufactures, of which it consisted at the testator's

death. The par value of it was \$100 per share; its real value at testator's death, \$250; and its present value \$300 per share. The society had mortgage debts at testator's death, many of which have since been paid off out of its assets, and have bought and sold real estate, but to what value does not appear. It declared irregular dividends on the shares since his death, not based upon the earnings of the society, but upon the necessities of the executors and testator's children. These have varied from four to seven per cent. yearly, on the par value of the shares. The master was directed to allow interest at the rate of seven per cent. for the time in which the executors received the interest at that rate, and at the rate of six per cent. during the residue of the time. He has computed interest at seven per cent. during that part of the time in which the executors received dividends at that rate on the par value of these shares, and allowed interest upon interest. The exceptants contend that interest should be allowed at that rate only when the dividends amounted to seven per cent. on the real value of the shares in which the estate was invested, and that interest should not have been calculated upon interest. *Held*, that the master rightly allowed the seven per cent. on the par value during the time that that rate of interest was paid, and that the interest was properly computed by yearly rests. *Fowler v. Colt*, 44

2. The funeral expenses of the granddaughter of the testator, and the physician's bill in her last illness, cannot be ordered to be paid out of the testator's estate, there being no estate of her own out of which these expenses can be paid. She was under the age of eighteen years at her death, in September, 1866. The income of \$20,000 directed to be held in trust for her had, by order of the court, been expended in her education and support, except \$789, which was the increase by accumulation. The testator directed, if she should die without issue under twenty-five, that the

sum of \$20,000 given to her, with the accumulations thereon, be added to his general estate, and considered as part thereof. That estate he gave to three of his children, then living. The will also directed that the granddaughter should be educated and supported out of this income until she was eighteen. The medical expenses exceeded the surplus of \$789. *Held*, that the grand-daughter being entitled to the whole of the income for her support, there could be no accumulation in the sense in which that word is used in the will, so long as the physician's bill, or any expenses incurred by or for her in her lifetime remain unpaid, and that the surplus must therefore be applied to the medical expenses. If the medical expenses did not absorb the surplus, the funeral expenses would also be included in this provision for her support and maintenance, and any balance would have been applied for that purpose. But the principal of \$20,000 was not subject to her support and maintenance, in case of her dying under twenty-five, but was vested in the legatees. These expenses cannot be ordered to be paid out of the estate of the testator. *Ib.*

3. A gift of a fund with its increase from accumulation, amounts to a direction to the executor to accumulate, which can only be done by putting it at interest. And where the fund is large, and the time for holding it in trust long, this direction must be held to apply to the interest as well as to the principal. *Ib.*

4. In all cases where the will contains no directions as to commissions or expenses of administration, specific legacies and bequests of specific sums are not charged with them, but are paid in full, and the commissions are taken from the residue, or such assets as are not disposed of. *Ib.*

5. If a father does not sufficiently provide for the support of a child or one to whom he stands *in loco parentis*, the courts cannot take from the legacies to others to furnish

- such support, or pay funeral expenses in case of death. When a legacy to a child of the testator is directed to be paid on a future day, with no direction as to interest, in the case of an infant having no other means of support, they will order interest to be paid. *Ib.*
6. Where a fund is given at a future day to several, with provision that if any die, their share should go to the survivors, support for all will be ordered out of the fund; but this is only in cases where all are included in the contingency of advantage from the gift over, and of loss by dying before the time specified. And in such case when there is an absolute gift over on the death of all it will not be ordered, unless by consent of the person to whom it is so given. *Ib.*
7. Where it appears from the attestation clause, that the will offered for probate as the last will and testament of the testatrix, was signed and declared by her to be such will, in the presence of the subscribing witnesses, the statutory requirement that both witnesses should be present at the same time, is shown to have been complied with. *In re Kirkpatrick's Will*, 463
8. A cancellation of a legacy, by the testator by drawing lines with a pen across the words, is a sufficient revocation. *Ib.*
- party in a representative capacity. *Sweet v. Parker*, 453
2. The general rule is, that the competency of a witness is determined by his *status* when he is sworn and examined. *Walker v. Hill's Ex'rs*, 513
3. By the act of March 27th, 1866, (*Nic. Dig.* 1045), a party in a representative capacity may be admitted as a witness in his own behalf; and if so admitted, the opposite party may in like manner be admitted as a witness. If, in an action in which the executor of a deceased is a defendant, the complainant offers himself as a witness and is examined in his own behalf before the defendant has been sworn in his own behalf, the complainant is not a competent witness when sworn; and his deposition will not be made competent by the fact that the defendant is subsequently examined in his own behalf. But if the defendant intends to exclude the complainant's deposition, he must move to suppress it, accompanied by an offer to withdraw his own deposition. If no motion to suppress is made, and at the hearing the defendant relies on his own deposition, he will be held to have elected to legalize the deposition of the complainant, which would have been legal if taken in a different order, and will be estopped from taking the unfair advantage of reading his own deposition and excluding that of the other party. *Ib.*

§c ADMINISTRATION

WITNESS

1. The complainant is inadmissible as a witness where the answer is by a



§c EVIDENCE, 3.

WRIT OF ASSISTANCE.

§c PRACTICE, 1, 2.





